

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE, ELLEN
SWEETS, BENNY ALEXANDER, GEORGE
MORGAN, VOTO LATINO, TEXAS STATE
CONFERENCE OF THE NATIONAL
ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, AND TEXAS
ALLIANCE FOR RETIRED AMERICANS,

Plaintiffs,

v.

RUTH HUGHS, in her official capacity as the
Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577-OLG

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The Secretary takes the remarkable position—during a once-in-a-century pandemic that has made voting by mail the primary means of accessing the franchise—that voting by mail is simply a luxury; Texas’s state officials have no responsibility to ensure that voters can effectively cast mail ballots; and even if those officials could help, this Court has no power to make them do so. Not only this, the Secretary argues that the Court should dismiss Plaintiffs’ claims on the pleadings without Plaintiffs having the opportunity to have their claims *heard*. These arguments ignore reality and are directly contrary to binding precedent. The Constitution does not allow Texas to operate a vote-by-mail regime that is guaranteed to burden and disenfranchise an untold number of voters, particularly in the coming election in which the severity of the burden of the Postage Tax, Ballot Receipt Deadline, Signature Match Requirement, and Voter Assistance Ban (collectively, the “Vote By Mail Restrictions”) will be exacerbated and impact a broader number of voters as many shift to mail voting due to COVID-19. Notably, the Secretary’s Motion outright ignores that ongoing health crisis. *Nowhere* in the Motion do the words “COVID,” “health,” or “virus” appear. The *single mention* of the word “pandemic” is a quote from Plaintiffs’ Complaint. Plaintiffs wish they could—as the Secretary seems to try to do—will the current pandemic away. But they cannot. And while it is not the basis for Plaintiffs’ claims, it provides important factual context, outside of which Plaintiffs’ claims cannot be accurately apprised. The Secretary’s decision to ignore that context is reason alone to look skeptically on her motion to dismiss.

The Secretary lodges both jurisdictional objections and arguments that Plaintiffs have failed to plead plausible claims. The Secretary is wrong on both counts. *First*, the Secretary’s argument that sovereign immunity bars claims like Plaintiffs’ has been *rejected* by the Fifth Circuit applying the *Ex parte Young* doctrine. *Second*, all Plaintiffs have standing. The Secretary’s argument that Plaintiffs Linda Jann Lewis, Madison Lee, Ellen Sweets, Benny Alexander, and

George Morgan (collectively, “Voter Plaintiffs”) face injuries that are too speculative ignores the applicable standard of review and facts pled in Plaintiffs’ complaint that are supported by declarations attached to this opposition. Voto Latino, the Texas State Conference of the National Association for the Advancement of Colored People (“NAACP”), and the Texas Alliance for Retired Americans (the “Alliance”) (collectively, “Organizational Plaintiffs”) possess Article III and statutory standing to prosecute this suit under theories of both organizational and associational standing. The Secretary’s half-hearted arguments to the contrary fail to withstand even cursory examination, and most were recently dispensed with by this Court in an order denying a motion to dismiss in *Richardson v. Hancock*, Case No. 5:19-cv-00963-OLG, (W.D. Tex. Dec. 23, 2019) at ECF No. 41 (“*Richardson Order*) (Ex. A at Appx. 1-33).

And *finally*, although the Secretary argues that Plaintiffs do not state a valid claim for relief under their four causes of action—(1) undue burden on the right to vote, (2) violation of equal protection, (3) violation of procedural due process, and (4) impermissible poll tax—the Secretary is wrong at every turn. Plaintiffs do not have to prove their case in a Complaint. They need only plead plausible claims for relief. Here, Plaintiffs have alleged facts, which must be accepted as true, demonstrating that the Vote By Mail Restrictions challenged here impose a heavy burden on the right to vote that far outweighs any purported State interest. This alone is fatal to the Secretary’s arguments at the pleadings stage. But rather than accept the facts as alleged, the Secretary argues them, claiming that because she says any burden is minimal, Plaintiffs are not entitled to substantive judicial review of their claims. This is not how Rule 12(b)(6) works, and the risk of disenfranchising thousands of Texans in the midst of a global pandemic is anything but minimal. Plaintiffs’ Complaint sets forth more than sufficient grounds for this Court to proceed to the merits. The Secretary’s motion fails in its entirety and should be denied.

ARGUMENT

A. Sovereign immunity does not bar Plaintiffs' claims.

The Secretary argues, ignoring controlling legal authority, that sovereign immunity bars Plaintiffs' claims. She is wrong for the reasons most recently discussed in *Texas Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2982937, at *6-8 (5th Cir. June 4, 2020) ("*TDP*").¹ Under *Ex parte Young*, sovereign immunity poses no bar to plaintiffs who (1) seek prospective injunctive relief (2) against a state actor who has "some connection" to the challenged law's implementation and enforcement. *K.P. v. LeBlanc*, 627 F.3d 115, 124-25 (5th Cir. 2010). Plaintiffs seek prospective injunctive relief, so the question is whether the Secretary has "some connection" to the Vote By Mail Restrictions. The Secretary argues she does not. Nonsense. The *Ex parte Young* doctrine provides an exception to sovereign immunity when the defendant enforces a challenged statute "by virtue of his office." *Id.* at 124. That is precisely the case here.

The Secretary focuses solely on the fact she does not *personally* provide ballot carrier envelopes, reject mail ballots for signature or delivery date issues, or prosecute individuals for voter assistance.² See Dkt. 17 at 2-3. This misapplies *Ex parte Young* and ignores binding precedent. Plaintiffs establish a sufficient "connection to the enforcement" when the official "effectively ensures the [statutory] scheme is enforced" or engages in actions, per the statute, that constrain the plaintiffs. *Air Evac EMS v. Texas, Dept. Of Ins.*, 851 F.3d 507, 519 (5th Cir. 2017).

¹ *TDP* considered a stay of a preliminary injunction pending appeal, so it did not rule on the substance of the parties' arguments, but instead opined on the likelihood of their success. *TDP*, 2020 WL 2982937, at *8.

² Worth noting is the troubling implications of the Secretary's argument. Although county election officials have no power to ignore the statutory provisions challenged here, the Secretary effectively argues that no one can challenge state law without joining 254 counties in a lawsuit. This is not required, and would be a recipe for unmanageable proceedings and a grossly inconvenient and unnecessary burden on county officials hauled into court far from their local jurisdiction. The standing doctrine ensures that the Court is resolving real disputes between parties. It does not operate as a roadblock to be deployed by a State that does not wish to have its laws challenged.

Texas Election Code § 31.003 unequivocally states that the Secretary “shall obtain and maintain uniformity in the application, operation, and interpretation of [the Election Code] and of the election laws outside th[e] code.” Although the Secretary attempts to distance herself from her statutory duty to ensure uniform enforcement of the election code, the statute’s use of the word “shall” makes clear these duties are mandatory. *See Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001). The Secretary therefore has the requisite connection to the challenged Vote By Mail Restrictions for *Ex parte Young* to apply. *See TDP*, 2020 WL 2982937, at *8 (“[O]ur precedent suggests that the Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code’s vote-by-mail provisions to . . . suggest[] that *Young* is satisfied.”).

Finally, the Secretary’s attempt to exclude “injunctions directing ‘affirmative action’” from *Ex parte Young*’s reach is plainly wrong. Many cases have applied the doctrine in suits imposing mandatory injunctions.³ “Under *Ex parte Young*, ‘a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law,’” *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (quoting *Quern v. Jordan*, 440 U.S. 332, 337 (1979)), including by undertaking affirmative obligations.⁴ The Secretary ignores this binding precedent in favor of cherrypicked quotes from cases that did

³ *See, e.g., Verizon Md., Inc. v. Public Serv. Comm’n of Maryland*, 535 U.S. 635, 640; *Air Evac EMS*, 851 F.3d at 521; *Green Valley Special Util. Dist. v. Walker*, 324 F.R.D. 176, 182 (W.D. Tex. 2018); *Hall v. Louisiana*, 983 F. Supp. 2d 820, 835 (M.D. La. 2013).

⁴ *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (rejecting state’s assertion of sovereign immunity concerning requirement that state pay for future educational components of relief); *Thomas ex rel. D.M.T. v. School Bd. St. Martin Parish*, 756 F.3d 380, 387-88 (5th Cir. 2014) (noting school board “remained subject to affirmative obligations” by permanent injunction issued by court to remedy constitutional harms).

not apply the rule she advances.⁵ That inapposite authority does not advance the Secretary’s cause. Sovereign immunity does not bar Plaintiffs’ claims.

B. All Plaintiffs have standing.

The Voter Plaintiffs and the Organizational Plaintiffs have standing to challenge the Vote By Mail Restrictions. To establish Article III standing, a plaintiff must show (1) an “injury in fact” (2) that is “fairly traceable” to the challenged conduct and (3) can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because Plaintiffs seek injunctive relief, only one party must have Article III standing for the case to proceed. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Texas v. United States*, 945 F.3d 355, 377–78 (5th Cir. 2019). That threshold is clearly surpassed here by the allegations in Plaintiffs’ Complaint, as detailed below. It is axiomatic that, in ruling on a motion to dismiss, the Court must accept Plaintiffs’ allegations as true, including as related to Plaintiffs’ standing. *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001) (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)).

1. All Plaintiffs allege sufficient injury to confer standing.

“To be an injury in fact, a threatened injury must be (1) potentially suffered by the plaintiff . . . , (2) concrete and particularized, not abstract, and (3) actual or imminent, not conjectural or hypothetical.” *Stringer v. Whitley*, 942 F.3d 715, 720–21 (5th Cir. 2019) (quotation marks omitted). “For a threatened future injury to satisfy the imminence requirement, there must be at least a ‘substantial risk’ that the injury will occur.” *Id.* at 722. That substantial risk is present here. *See, e.g., Delisle v. Boockvar*, No. 95 MM 2020 (Pa. May 29, 2020) (Wecht, J., concurring)

⁵ *See, e.g., Zapata v. Smith*, 437 F.2d 1024, 1025-26 (5th Cir. 1971) (reversing district court because United States not properly joined as a party); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704-05 (1949) (considering injunction to prohibit agency from entering into new contract on principles of sovereign immunity).

(“[U]nder the current extraordinary circumstances [caused by COVID], the potential for impairment of the ability of voters to cast a valid ballot by mail is real and substantial, and the stakes are high.”). All Plaintiffs can show the requisite injury.

a. The Voter Plaintiffs’ alleged injuries are not speculative.

The Secretary’s argument that the Voter Plaintiffs’ injuries are speculative because they are not “certainly impending,” and because “Plaintiffs do not allege they *will be* prevented from voting,” Dkt. 17 at 4, 6, misses the mark. For an individual plaintiff’s injury to be sufficient to confer standing, the Fifth Circuit requires “some evidence that the plaintiff intends to take the [injury-causing] action again.” *Stringer*, 942 F.3d at 722. *Stringer* held that individual plaintiffs lacked standing where they sued to challenge aspects of a voter registration option only available when individuals changed their place of residence in part because no plaintiff had “expressed any intention to move in the future.” *Id.* But here, there is no question that the Voter Plaintiffs intend to vote by mail in the upcoming election. *See* Compl. ¶¶ 13-19. Because they do, and because their health conditions and socioeconomic status put them at high risk for both COVID-19 and disenfranchisement as a result of the Vote By Mail Restrictions—which indisputably apply to them—their injuries are not speculative. Rather, the Voter Plaintiffs’ injuries are impending since, for example, Ms. Lewis’s and Ms. Lee’s signatures continually change due to their respective vision disorder and rheumatoid arthritis, putting them at a severe risk of being disenfranchised as a result of the Signature Match Requirement. *Id.* ¶¶ 13-14; *see also* Linda Jann Lewis Decl., Ex. B at Appx. 35-36 ¶ 6 (disability affects vision and signature); Ellen Sweets Decl., Ex. C at Appx. 40 ¶ 7 (fatigue from severe asthma affects handwriting); Benny Alexander Decl., Ex. D at Appx. 43 ¶ 5 (lightheadedness from congestive heart failure affects signature). And Mr. Morgan’s poverty and serious health condition prevent him from being able to venture out safely to buy a stamp to vote—as is required by the Postage Tax—which, in addition to the mail disruptions he has

experienced due to the pandemic, puts him at serious risk of disenfranchisement due to the Ballot Receipt Deadline, particularly in concert with the Voter Assistance Ban that prohibits him from asking a friend to deliver his ballot. Morgan Decl., Ex. E at Appx. 47-48 ¶¶ 7-9; *see also* Lewis Decl. Ex. B at Appx. 36 ¶ 7 (limited income strains ability to purchase stamps, which she would hesitate to do now regardless because of the health risk that going out to buy stamps would pose).

Plaintiffs need not show it is certain that they will be disenfranchised by the Vote By Mail Restrictions to have standing to challenge them. Rather, the “threatened future injury (disenfranchisement) more than satisfies the standing necessary for injunctive relief.” *Stringer v. Pablos*, No. SA-16-CV-257-OG, 2020 WL 532937, at *8 (W.D. Tex. Jan. 30, 2020). “[I]ndividual plaintiffs should not be forced to wait and suffer a constitutional deprivation” when relief through this Court is available. *Id.* (citing *Texas v. United States*, 809 F.3d 134, 173 n.137 (5th Cir. 2015), *as revised* (Nov. 25, 2015)). “Simply put, a voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote.” *People First of Alabama v. Merrill*, No. 2:20-cv-00619-AKK, 2020 WL 3207824 at *6-7 (N.D. Ala. June 15, 2020) (citing *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009)).

Likewise, “[t]he inability of a voter to pay a poll tax . . . is not required to challenge a statute that imposes a tax on voting.” *Common Cause*, 554 F.3d at 1352 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966)). *Cf. OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (“OCA”) (noting that injury need not be “large” or “substantial”; indeed, “it need not measure more than an identifiable trifle”).

Finally, the Secretary insultingly suggests that the harms posed to Plaintiffs by the Vote By Mail Restrictions are no big deal because “only 1.4 percent of mail-in ballots were rejected nationwide.” Dkt. 17 at 5. This shows the Secretary’s brazen disregard for the constitutional rights

of the *more than 9,000 Texas voters* whose ballots were actually rejected as a result of those restrictions, even in non-pandemic conditions,⁶ and ignores well-established precedent. Disenfranchisement, even for a small number of people, imposes severe burdens on voting rights.⁷ In any event, the Voter Plaintiffs' serious medical conditions and physical ailments that affect their signatures and put them at high risk for COVID-19 when venturing out to buy stamps or deliver a ballot that they cannot receive assistance in delivering provide the "Plaintiff-specific" allegations needed for standing because they show "that there is a substantial risk that they will suffer the potential future injury absent their requested relief." *Stringer*, 942 F.3d at 722.

b. The Organizational Plaintiffs face associational injury.

The Secretary argues that the Organizational Plaintiffs do not identify members sufficient to confer associational standing. Again, the Secretary misconstrues or simply misapprehends binding precedent. The individual participation of an organization's members is "not normally necessary when an association seeks prospective or injunctive relief for its members," as do Plaintiffs here. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (citation omitted); *see also Richardson* Order, Ex. A at Appx. 12-13 (complaint sufficiently pled associational standing based on injuries allegedly suffered by organizational plaintiffs' members).⁸ Because the Complaint alleges that the Organizational

⁶ Notably, the report cited by the Secretary confirms that the rejection rate for mail ballots in Texas in the 2018 election was 1.76%, which is higher than the national average of 1.4%. U.S. Election Assistance Commission, *2018 Election Administration and Voting Survey*, (June 2019) https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf at 30.

⁷ *See, e.g., League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("[T]he basic truth that even one disenfranchised voter—let alone several thousand—is too many."); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591-93 (6th Cir. 2012) (law likely unconstitutional that affected only 0.248% of ballots cast).

⁸ *See also Hancock Cty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) (association need not "set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on a lack of associational standing"); *Democratic Nat'l*

Plaintiffs are membership organizations and the Vote By Mail Restrictions place undue burdens on their members' right to vote, the Complaint sufficiently alleges associational injury. *See* Compl. ¶¶ 20-25. The Secretary also repeats her position that, for the Voter Plaintiffs who are members of the NAACP and Alliance, their alleged individual injury is not sufficient to confer standing. Dkt. 17 at 6. But that argument falls flat for the reasons detailed above. *See supra* B.1.a.

c. The Organizational Plaintiffs face direct organizational injury.

Organizational Plaintiffs also allege sufficient injury for direct organizational standing based on controlling Fifth Circuit precedent that the Secretary simply ignores. An organization suffers an Article III injury when it must divert resources from its usual activities to lessen the harm caused by an act that frustrates its mission. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). All three Organizational Plaintiffs satisfy this standard.

First, Voto Latino will need to divert significant funds from its voter registration efforts, get out the vote efforts, and digital advertising budget to educate voters on how to avoid the burdens imposed by the Vote By Mail Restrictions, which frustrate its mission. *See* Compl. ¶ 21; Maria Teresa Kumar Decl. Ex. F at Appx 51-53 ¶¶ 6-10. Second, the Restrictions will frustrate the NAACP's mission "to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons," which it achieves by "engag[ing] in voter education and registration activities." Compl. ¶ 23. But because of the Vote By Mail Restrictions, the NAACP "must divert additional time and resources to educate its members and constituents to make sure that they are able to obtain the postage necessary to mail their ballots; that they are aware of the Ballot Receipt Deadline and will be able

Comm. v. Bostelmann, No. 20-CV-249-WMC, 2020 WL 1320819, at *3 (W.D. Wis. Mar. 20, 2020) (party had associational standing based on allegation that the challenged laws "place[d] undue burdens on [its] members' right to vote").

to mail their ballots in time for them to be received timely . . . ; and to make sure they are aware of the Signature Match Requirement and the need to contact county elections officials to ensure that their ballots have not been rejected on the basis of signature mismatch,” *Id.* ¶ 24, none of which it would have to do but for the Restrictions. Gary Bledsoe Decl., Ex. H at Appx 61-62 ¶ 7. And finally, the Alliance has diverted resources from its voter registration, phone banking, and get out the vote activities to education on how to avoid the pitfalls that the Restrictions impose. Compl. ¶ 25; Judy Bryant Decl. Ex. G at Appx 56-58 ¶¶ 5-6, 9. At the pleading stage, these allegations are sufficient to establish standing. *Lujan*, 504 U.S. at 560-61.

The Secretary’s assertion that these allegations are insufficient ignores controlling case law. In *Havens Realty*, the U.S. Supreme Court held that plaintiffs’ allegations that the defendants’ “racial steering practices” frustrated their “efforts to assist equal access to housing through counseling and other referral service” by forcing them “to devote significant resources to identify and counteract the defendant[s’] racially discriminatory steering practices” were sufficient to withstand a motion to dismiss. 455 U.S. at 379; *see also Richardson* Order, Ex. A at Appx. 10-12 (complaint sufficiently pled organizational standing by alleging organizational plaintiffs must expend “additional resources” to provide “instruction and support on mail-in ballots”); *Bostelmann*, 2020 WL 1320819, at *3 (same).⁹

Plaintiffs’ well-pled factual allegations clearly suffice; a point reinforced by cases from beyond the pleading stage. For example, in *OCA*, the organizational plaintiff’s mission was “to

⁹ Relatedly, the Fifth Circuit has made clear that the impact to an organization’s activities or resources does not need to be large or described in minute detail to establish standing. *See OCA*, 867 F.3d at 610-12 (injury requirement is “qualitative, not quantitative, in nature” and injury need not be large). The Secretary attempts to heighten that standard by citing *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) and non-binding precedent, Dkt. 17 at 8-9, but the Fifth Circuit expressly rejected a similar attempt in *OCA*. 867 F.3d at 612.

promote civic participation and provide civic education, which it carrie[d] out through a ‘Get Out the Vote’ initiative.” 867 F.3d at 609. Because the challenged law impeded “some” of the plaintiff’s members from voting, the plaintiff “redirected some of its efforts toward educating its members and other members of the public about” the challenged law. *Id.* at 609-10. The Fifth Circuit held this was clearly sufficient for purposes of organizational standing because these voter education efforts “consumed [plaintiff’s] time and resources in a way they would not have been spent.” *Id.* at 612. Thus, because the Vote By Mail Restrictions will cause the Organizational Plaintiffs to divert resources away from their normal programs to combat the effects of the Restrictions, they have standing to challenge them.¹⁰

Unable to explain away the long line of similar cases conferring standing on similar organizations in similar voting rights cases, the Secretary largely bases her theory of organizational standing on a D.C. Circuit decision which found that a labor union lacked standing to challenge the constitutionality of the Line Item Veto Act. Dkt. 17 at 7-8 (suggesting plaintiffs must show a “direct conflict” between their mission and the defendant’s conduct, citing *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423 (D.C. Cir. 1996)). The comparison the Secretary tries to draw is inapt. It is one thing to suggest that an Act concerning the President’s line item veto power is insufficiently related to a labor union’s mission for standing purposes, but to apply that reasoning to a nonprofit organization challenging laws that burden the very voters who those organizations serve, and that causes those organizations to divert their resources to activities addressing and attempting to ameliorate those burdens, is a logical leap that simply contradicts well-settled

¹⁰ See also *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008) (state party had standing because ID law caused it to “devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote”); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006) (holding party had standing to challenge state action based on diversion of resources).

precedent. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). Organizational Plaintiffs’ allegations are sufficient to establish direct organizational injury.

2. Plaintiffs’ claims are caused and redressable by Defendant.

The Secretary argues that she does not cause Plaintiffs’ injuries (and therefore, she asserts, cannot redress them) because it is local election officials, not her, who decide whether to count or reject a mail-in ballot, and local prosecutors, not her, who pursue charges for violations of the Voter Assistance Ban. *See* Dkt. 17 at 9. But, as a motions panel of the Fifth Circuit reiterated just weeks ago, *OCA* forecloses that argument. *See TDP*, 2020 WL 2982937, at *5-6 (reasoning that *OCA* “poses a significant obstacle” to the same causation and redressability argument the Secretary advances here) (citing *OCA*, 867 F.3d at 613).

Plaintiffs do not challenge local election officials’ decisions, but instead, the election laws the State requires them to follow. In *OCA*, plaintiffs similarly challenged a Texas law that prohibited counties from allowing unregistered individuals to interpret local election officials’ communications with voters. 867 F.3d. at 607-08. There, as here, the Secretary argued that the plaintiffs should have sued the local officials who implemented that law. *Id.* at 612-13. The Fifth Circuit rejected that argument. It reasoned that, because the Secretary is Texas’s Chief Election Officer and is required to “obtain and maintain uniformity in the application, operation, and interpretation of” Texas’s Election Code, the Court held that the Secretary was positioned to redress the plaintiffs’ injuries caused by a generally applicable election law. *Id.* at 613 (citing Tex. Elec. Code § 31.003). So too here.¹¹

¹¹ As relevant here, the Secretary’s description of her statutory authority ignores portions of the Texas Election Code that empower her to “take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the states['] electoral processes,” and “order” local officials to “correct offending conduct” when performing official functions “in a manner that impedes the free exercise of a citizen’s voting rights.” Tex. Elec. Code.

The Secretary attempts to avoid *OCA*'s inescapable application by asserting that it only reaches facial, rather than as applied, constitutional challenges, Dkt. 17 at 10 n.4, but that distinction is a red herring, and is undermined by a very recent decision from a motions panel of the Fifth Circuit. Nothing about *OCA*'s reasoning was premised exclusively on the fact that plaintiffs brought a facial challenge. And indeed, a Fifth Circuit motions panel recently applied *OCA*'s reasoning in a suit challenging the constitutionality of Texas's mail voting rules *as applied* during COVID-19 pandemic. *See TDP*, 2020 WL 2982937.

The Secretary next tries to distinguish *OCA* by relying on *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001), to argue that *OCA* does not apply because the Texas Election Code provides a private right of action for enforcement of the challenged statute, as did the statute in *Okpalobi*. *See* Dkt. 17 at 10 n.2 (citing Tex. Elec. Code § 221.003). *Okpalobi* involved a law providing unlimited liability against doctors in suit by patients for damages caused by abortion procedures. The court concluded that the doctor plaintiffs' injuries were caused by those private suits, not state officials who had no "enforcement connection to the challenged statute." 244 F.3d at 427 & n.35. It was thus the statute directly at issue in *Okpalobi* that contained the private right of action that *OCA* relied on in distinguishing *Okpalobi*.

But here, none of the Vote By Mail Restrictions contain a private right of action. The statute the Secretary relies on is the election contest statute, which requires a plaintiff to show the *result* of the election was different than that reported. Tex. Elec. Code § 221.003. Here, the question is

§ 31.005. Indeed, the Secretary's authority to issue orders to protect voting rights is accompanied by its own enforcement scheme: if an official "fails to comply, the secretary may seek enforcement . . . by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general." *Id.* Thus, in addition to being the chief election official responsible for maintaining uniformity in the application and interpretation of the Election Code, Texas law expressly authorizes the Secretary to remedy the voting rights violations identified in Plaintiffs' suit and to implement their requested relief. *See id.*

entirely different—whether specific provisions of state law violate the U.S. Constitution. No state law provides a private right of action on that question. Indeed, under the Secretary’s logic, the Fifth Circuit’s decision in *OCA* was wrong: that case also involved an election law, and the private right of action statute that the Secretary now cites as supposedly barring proceedings against the Secretary regarding election laws *was in effect* when *OCA* was decided. *OCA* controls.

Finally, the Secretary’s invocation of *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020) is also inapposite. That decision rested on specific features of Florida law that made the injury flowing from a ballot order statute not redressable by or traceable to Florida’s Secretary of State. *Id.* at 1207. But the Fifth Circuit expressly held in *OCA* that the Texas Secretary of State’s designation as “chief election officer” establishes standing for plaintiffs who sue the Secretary in election-law contexts in Texas, as do Plaintiffs here.

3. The Organizational Plaintiffs have statutory standing.

Finally, the Secretary ignores binding precedent to argue that 42 U.S.C. § 1983 does not permit Organizational Plaintiffs to challenge laws burdening the right to vote because organizations are third parties that do not themselves have the right to vote. *See* Dkt. 17 at 10-11. Yet again, this argument has already been rejected by the Fifth Circuit, and for good reason. The statutory standing inquiry asks courts “to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). The deprivation of rights alleged by Organizational Plaintiffs are those guaranteed by the First, Fourteenth, and Twenty-Fourth Amendments to the U.S. Constitution, which are squarely within the zone of interests encompassed by § 1983.

The Secretary’s position that organizations are barred from suing under § 1983 contradicts settled law. The Fifth Circuit has expressly interpreted § 1983 to allow suits by organizations that

have established associational standing. *See, e.g., Ass’n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010) (nonprofit had associational standing to assert § 1983 claims on members’ behalf in seeking prospective declaratory and injunctive relief).¹²

So too for direct organizational standing. Courts often find that organizations have direct standing under § 1983 to bring civil rights claims based on a diversion of resources injury alone—in part because a claim based on an organization’s direct injury vis-à-vis its frustration of mission and diversion of resources due to an unconstitutional law is *not* a third-party claim.¹³ Accordingly, even if the Organizational Plaintiffs only had direct organizational standing vis-à-vis their diversion of resources and the frustration of their missions (as opposed to *both* direct and representational standing, as is the case here), they would still have standing under § 1983.

The Secretary relies on cases that merely illustrate the general prohibition on individual, third-party standing—i.e., the standing of an *individual* seeking to assert a claim on behalf another individual—but all are inapposite because they do not involve *organizations*. *See* Dkt. 17 at 10-11 (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) (mother and daughter could not assert the third-party deprivation of husband and father’s constitutional rights); *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011) (judge’s secretary lacked standing to challenge constitutionality of her judge’s and employer’s suspension); *Conn v. Gabbert*, 526 U.S. 286, 287 (1999) (attorney lacked standing to challenge infringement of constitutional rights of client)). As explained above,

¹² *See also Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1278-79 (5th Cir. 1981) (church had representative standing in § 1983 action); *see also Jornaleros de Las Palmas v. City of League City*, 945 F. Supp. 2d 779, 800 (S.D. Tex. 2013) (organization was authorized to sue under § 1983 on behalf of its members).

¹³ *See, e.g., Georgia Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1258 (N.D. Ga. 2018) (plaintiffs have “organizational standing” under § 1983 based on need to “divert personnel and resources”); *Inclusive Cmtys. Project, Inc. v. Texas Dep’t of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 496 (N.D. Tex. 2010) (finding organizational plaintiff suffered an injury to its resources, and this was enough to establish standing to bring a claim under § 1983).

see supra B.1.b-c, Plaintiffs have demonstrated both associational and organizational standing, which forecloses the Secretary’s “statutory standing” defense and easily distinguishes this case from the authorities the Secretary cites.

C. Plaintiffs’ Complaint validly states four claims for relief.

The Secretary attempts to litigate the merits of this case by delving into the intricacies of each of Plaintiffs’ claims under the guise of Rule 12(b)(6). *See* Dkt. 17 at 11-27. But the only question at this stage is whether the allegations in Plaintiffs’ Complaint state valid claims for relief, which they unequivocally do. *See Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (dismissal under Rule 12(b)(6) “is appropriate only if the complaint fails to plead enough facts to state a claim to relief that is plausible on its face,” and is “viewed with disfavor and is rarely granted”); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (dismissal only appropriate if court determines it is “beyond doubt” that the claimant cannot prove a plausible set of facts that support the claim and would justify relief). In evaluating the Secretary’s challenge, moreover, the Court must (1) accept Plaintiffs’ factual allegations as true, and (2) view them in the light most favorable to Plaintiffs. *See Martin K. Eby Const. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004). Because the Secretary’s Motion is a premature attempt to litigate plausibly pleaded claims and block them from having their day in court, it should be denied.

1. *Anderson-Burdick* claim (all four Vote By Mail Restrictions)

The Secretary’s argument that Plaintiffs have not sufficiently alleged an undue burden on the right to vote misunderstands the law and ignores the ample facts plead in Plaintiffs’ Complaint. Plaintiffs’ undue burden claim, which is evaluated under the familiar *Anderson-Burdick* test, encompasses all four Vote By Mail Restrictions—the Ballot Receipt Deadline, Signature Match Requirement, Voter Assistance Ban, and Postage Tax—and is based on Plaintiffs’ allegations that, even in ordinary times, those Restrictions burden the right to vote, and that the pandemic has

helped exacerbate those burdens to a point that outweighs the government’s interest in them (to the extent it even has one). *See, e.g.*, Compl. ¶¶ 114-121. Under *Anderson-Burdick*, a court considering such a challenge to a state election law must carefully balance the character and magnitude of injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against “‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Where, as here, “plaintiffs have plausibly alleged that each of the challenged provisions imposes a burden on voters that is not justified by the state’s interests,” the “allegations are sufficient to survive a motion to dismiss.” *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 3077047, at *5 (W.D. Wis. June 10, 2020); *see also Miller v. Doe*, 422 F. Supp. 3d 1176, 1185-86 (W.D. Tex. 2019) (refusing to dismiss claim subject to *Anderson-Burdick* test where plaintiffs alleged ballot access provisions were unconstitutional); *League of Women Voters of Florida, Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1288 (N.D. Fla. 2018) (“It is sufficient for a 12(b)(6) motion that Plaintiffs have alleged [that the challenged laws] have burdened their voting rights.”). Here, Plaintiffs have alleged that all four Vote By Mail Restrictions impose undue burdens on the right to vote, and that these burdens will be all the more severe due to the pandemic, which is nearly certain to limit voters’ ability to vote in person and otherwise escape the burdens imposed by the Restrictions. *See, e.g.*, Compl. ¶¶ 114-121. Plaintiffs have also alleged that no state interest justifies these burdens. *See id.*

First, Plaintiffs allege that the Postage Tax imposes a burden on the right to vote because, at best, it requires Texans “to pay to vote by mail so that they can avoid exposing themselves to

the virus while exercising their right to vote,” and at worst, “disenfranchises the millions of Texans who cannot risk exposure to COVID-19 but who also cannot obtain postage to mail their ballots.” *Id.* ¶ 114; *see also id.* ¶¶ 70, 73-74, 76. They also allege that “[t]he Secretary can offer no justification that outweighs the significance of the burden under these circumstances.” *Id.* ¶ 115.

Second, Plaintiffs allege that the Ballot Receipt Deadline burdens the right to vote because it subjects ballots timely mailed by voters to arbitrary disenfranchisement due to the vagaries of the USPS, which is facing grave difficulties and delays in the face of the global pandemic. *Id.* ¶¶ 79-83, 87-90, 93-95, 116. Plaintiffs further allege that this burden is not outweighed by any State interest since the Secretary already counts other ballots—those from overseas voters—if received by the sixth day after the election, and that “any administrative costs are dwarfed by the constitutional injury to the Texans completely disenfranchised because the USPS did not timely deliver a ballot timely mailed by the voter.” *Id.* ¶ 117. To be sure, burdens on voting rights are especially serious when voters are harmed through no fault of their own. *See, e.g., Husted*, 696 F.3d at 597 (holding that an Ohio law that rejected ballots cast in the wrong precinct but the correct polling place solely because of poll worker error imposed “substantial” burdens on voters).

Third, Plaintiffs allege that the Signature Match Requirement burdens voters because it subjects them to an arbitrary and error-prone process if their ballot signature is deemed to be a mismatch, which may thus result in disenfranchisement without their agency, knowledge, or any opportunity to cure any purported problems with their lawfully cast ballot. *Compl.* ¶¶ 96-104, 118. They go on to allege that “[t]he administrative burden of notifying voters of signature mismatch is no different before the election than it is after the election, when counties are now required to notify voters that their ballots were rejected,” and the Requirement “does not serve an interest in

fraud that could not otherwise be achieved without the disenfranchisement of countless Texas voters,” particularly since a cure process would satisfy any anti-fraud interest. *Id.* ¶ 119.

Fourth, Plaintiffs allege that the Voter Assistance Ban burdens the right to vote because it effectively disenfranchises voters who require assistance in *mailing* their ballots but lack a family member or roommate to assist, and also disenfranchises voters who are understandably concerned that unpredictable USPS delays will otherwise disenfranchise them, but are either unwilling or unable to venture out to *deliver* their ballots due to public health concerns. *Id.* ¶¶ 105-11, 120. Plaintiffs further allege that this burden is “heavier on poor, minority, and rural voters who generally have less access to postal services, are less likely to have access to personal and reliable transportation, and are less able to bear the costs of waiting in long lines to vote or exposing themselves to health risks in order to submit a mail ballot in person.” *Id.* ¶ 107. Finally, Plaintiffs allege that the State’s interest in enforcing the Ban “cannot justify disenfranchising voters who require assistance to timely deliver their ballots,” especially since Texas laws already criminalizes any exercise of undue influence or voting fraud that might be captured by the Ban. *Id.* ¶ 120.

These alleged burdens on voters and lacking state interests more than adequately state an undue burden on the right to vote claim sufficient to withstand the Secretary’s motion to dismiss. *See Miller*, 422 F. Supp. 3d at 1185-86. Moreover, as Plaintiffs also allege, these burdens are all but certain to increase as the COVID-19 crisis continues, and as Texas voters are increasingly required to rely on mail ballots to protect their health. *See generally* Compl.

Although the Secretary asserts a number of justifications for the Vote By Mail Restrictions, they do nothing to undermine the sufficiency of Plaintiffs’ *allegations*—which is all that is at issue at the pleadings stage. For example, the Secretary points to a 2003 Indiana case to suggest that the specter of fraud outweighs the Restrictions’ burdens on Plaintiffs. Dkt. 17 at 26. But that

argument—with which Plaintiffs, of course, disagree, *see* Compl. ¶ 120—does not show that Plaintiffs’ undue burden claim is *implausible*. Likewise, the fact that the Secretary thinks she may have defenses to Plaintiffs’ undue burden claim does not mean that it fails as a matter of law. The Secretary can raise her substantive arguments at a later point in the case. But because Plaintiffs’ allegations, when taken as true, demonstrate that the Vote By Mail Restrictions present an undue burden on the right to vote that is not outweighed by any State interest, Plaintiffs have more than adequately pled a plausible undue burden claim to survive the motion to dismiss.

Rather than take Plaintiffs’ allegations as true—as the Court is required to do here—the Secretary asks this Court to dismiss Plaintiffs’ undue burden claim without the robust perspective that a developed record would provide. But undue burden claims necessarily require factual development to determine whether the State’s interests outweigh the burden on voters. As courts across the country have held, dismissal of a claim subject to the *Anderson-Burdick* standard is not appropriate at the motion to dismiss stage because it requires weighing of the evidence and balancing of the relevant factors. *See, e.g., Bostelmann*, 2020 WL 3077047, at *5; *Detzner*, 354 F. Supp. 3d at 1288. Indeed, circuit courts across the country have *reversed* the dismissal of claims subject to the *Anderson-Burdick* standard before the evidentiary record was developed. *See, e.g., Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) (“[W]ithout any factual record at this stage, we cannot say that the Secretary’s justifications outweigh the constitutional burdens on [plaintiff] as a matter of law.”); *Price v. New York State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (explaining, in reversing lower court’s dismissal, that while plaintiffs offered little evidence about the burden that election law imposed, “[f]or our initial purposes, it is important only that there is at least some burden on the voter-plaintiffs’ rights”); *Wood v. Meadows*, 117 F.3d 770, 776 (4th Cir. 1997); *Duke v. Cleland*, 5 F.3d 1399, 1405-06 & n.6 (11th Cir. 1993) (noting that it was

“impossible for [the Court] to undertake the proper” *Anderson-Burdick* analysis without a record). The same factual development is necessary here. This Court cannot properly dismiss Plaintiffs’ undue burden claim without considering an evidentiary record demonstrating the magnitude of the alleged burden on the right to vote. Tellingly, the Secretary has not cited a single case dismissing a claim subject to the *Anderson-Burdick* test on a motion to dismiss. Not one.

The Secretary’s assertion that the burdens imposed by the Vote By Mail Restrictions do not implicate the right to vote is plainly wrong. *See* Dkt. 17 at 13-14 (citing *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 807 (1969)); *see also id.* at 17, 27. The Secretary cites no persuasive—much less controlling—support for this position, instead relying on an equal protection (*not* undue burden) case decided *twenty years prior* to *Anderson* and *Burdick* concerning whether inmates of a county jail had a right to receive absentee ballots.¹⁴ Moreover, the Secretary ignores the plain fact that courts across the country routinely employ the *Anderson-Burdick* balancing test to evaluate challenges to laws that circumscribe how citizens vote. *See, e.g., Lee v. Virginia State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (applying *Anderson-Burdick* to challenge concerning voter ID law); *Obama for Am. v. Husted*, 697 F.3d 423, 429-30 (6th Cir. 2012) (applying *Anderson-Burdick* to challenge concerning early voting). The Secretary’s argument that “[t]he Constitution does not include a freestanding right to vote in whatever manner Plaintiffs deem most convenient” is an obvious strawman. Dkt. 17 at 13. There is neither a constitutional right to vote by mail nor a constitutional right to vote in person at a polling place on

¹⁴ Although *TDP* discussed *McDonald* with regard to whether the right to vote is implicated by the Twenty-Sixth Amendment, that discussion is inapplicable here based on the different focus of this case. Moreover, *TDP* is non-precedential and, as discussed in *Gloria v. Hughes*, Case No. 5:20-cv-00527-OLG, ECF No. 15 (June 15, 2020 W.D. Tex.), has flawed reasoning as to when and whether the right to vote is implicated. *TDP*’s reasoning as to sovereign immunity and standing, as discussed above, is uncontroversial based on *OCA*.

Election Day; there is only “the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). If signing of a referendum merely seeking a statewide vote on an issue “implicate[s] the fundamental right to vote,” *Lemons v. Bradbury*, 538 F.3d 1098, 1102 (9th Cir. 2008), then surely restrictions on how that vote is cast do too. Plaintiffs’ Complaint plausibly alleges that the right to vote effectively is burdened by the Vote By Mail Restrictions.

The Secretary’s related suggestion that Plaintiffs cannot state an undue burden claim because they do not allege total deprivation of their right to vote can also be dismissed out of hand. *See, e.g.*, Dkt. 17 at 12 (“[A]ny Texas voter who finds voting by mail inconvenient is free to vote in person.”). The *Anderson-Burdick* standard hardly requires the denial of the right to vote for a state election law to be unconstitutional. It instead requires the Court to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789 (1983)). Under this standard, burdens falling short of a complete denial of the right to vote have not merely been found sufficient to state a claim, but sufficiently burdensome as to be unconstitutional. *See, e.g.*, *Obama for Am.*, 697 F.3d at 467-37 (eliminating early voting for non-military voters held unconstitutional, even though polls were still open to them on Election Day); *League of Women Voters of Florida, Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1209 (N.D. Fla. 2018) (eliminating early voting at university building held unconstitutional, even though students could vote elsewhere both before and on Election Day). Under the grave circumstances of the COVID-19 pandemic—which

the Secretary does not acknowledge in her 27 pages of briefing—her suggestion that voting by mail is simply a luxury or convenience is out of touch with reality, and the law.

Finally, the Secretary’s insistence that the Vote By Mail Restrictions are lawful because some other states have similar restrictions is a red herring that violates *Anderson-Burdick*’s basic inquiry. States’ election laws are not fungible. Instead, each state’s law must be considered individually, taking into account the burden on that state’s voters. *Anderson-Burdick*’s balancing test “cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions”; the “results of [the] evaluation will not be automatic” because “there is ‘no substitute for the hard judgments that must be made.’” *Anderson*, 460 U.S. at 789-90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1983)). In each case, courts must make the “hard judgment” our Constitution demands, based on the specific injuries plaintiffs suffer as a result of the challenged laws, the specific justifications offered by the State for the laws, and whether the laws advance those interests sufficiently to justify the injuries to the plaintiffs’ right—none of which, it bears noting again, can be done without a factual record. *See Crawford*, 553 U.S. at 190 (controlling op.) (citing *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Thus it is “not enough for [Texas] to simply rely on [similar provisions] in other states; the necessary question is how [the Vote By Mail Restrictions] interact[] with other voting practices in [Texas], and the burdens th[ese] law[s] place[] on voters who vote within [Texas’s] electoral framework.” *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 665 (6th Cir. 2016).

To put a finer point on it, the Supreme Court has emphasized that when assessing the severity of a burden, courts must consider the effects of the restriction on those voters who are actually impacted by the law. *Crawford*, 533 U.S. at 198, 201 (controlling op.) (explaining that “[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible

to vote but do not possess a [photo ID],” not the burdens on all voters). Thus, for example, the Secretary’s argument that the Ballot Receipt Deadline is not burdensome because a large percentage of voters are able to comply with it is not persuasive. That some voters can comply with the Vote By Mail Restrictions, or that other states also have such deadlines, is of no import to the decision that this Court must make—*i.e.*, how the Texas voters affected by these Restrictions are burdened—and is certainly insufficient to warrant dismissal at the pleading stage. Because Plaintiffs adequately allege that the Restrictions place an undue burden on the right to vote that is not outweighed by state interests, dismissal of their undue burden claim is not appropriate.

2. Equal protection claim (Ballot Receipt Deadline & Signature Match)

The Secretary garbles the legal standard under which this Court must evaluate Plaintiffs’ equal protection claim. First, she incorrectly asserts that the Ballot Receipt Deadline component of Plaintiffs’ equal protection claim will only be subject to (and in her view, cannot overcome) rational basis review. *See* Dkt. 17 at 20. Second, she wrongly suggests that Plaintiffs must show intentional discrimination to support the Signature Match part of their equal protection claim, and argues that it must fail because “Plaintiffs do not even assert, let alone plausibly allege, discriminatory intent.” *Id.* at 25. Neither are correct.

Where, as here, “a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, [courts] review the claim using the ‘flexible standard’ outlined in [Anderson] and [Burdick].” *Obama for Am.*, 697 F.3d at 429-30 (6th Cir. 2012). Courts across the country have confirmed that claims alleging equal protection violations in the voting context are properly evaluated under *Anderson-Burdick*. *See, e.g., Republican Party of Ark. v. Faulkner Cty.*, 49 F.3d 1289, 1293 n.2 (8th Cir. 1995) (*Anderson* sets out proper method for balancing equal protection concerns); *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992) (“[E]qual protection challenges to state ballot-access laws are considered under the *Anderson* test.”); *Rosen*

v. Brown, 970 F.2d 169, 178 (6th Cir. 1992) (“utilizing the *Anderson* balancing test” in a challenge based on equal protection); *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *1, *3, *6 (N.D. Fla. Oct. 16, 2016) (applying *Anderson* framework to equal protection claim targeting mail vote signature laws). No part of the *Anderson-Burdick* assessment requires a showing of intentional discrimination. For the same reasons detailed above, *see supra* C.1, Plaintiffs’ allegations that the Signature Match Requirement and “Ballot Receipt Deadline, as applied, treat[] Texans different depending on where they live,” Compl. ¶ 123—in concert with their allegations regarding those Restrictions’ burdens on the right to vote, *id.* ¶ 124—are sufficient to state an equal protection claim to be evaluated under the *Anderson-Burdick* framework.¹⁵

3. Procedural due process claim (Signature Match)¹⁶

The Secretary’s reliance on *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) to argue that Plaintiffs’ Signature Match due process claim cannot succeed is misplaced, as recently distinguished by this court in the *Richardson* Order, Ex. A at Appx. 24 n.16. At issue in *Lemons* was the process for verifying referendum petition signatures. The process to determine signature matches in *Lemons* drastically differed from that at issue here. In *Lemons*, the Oregon Secretary of State “sponsor[ed] signature verification training sessions, and county elections officials regularly attend these sessions and use the materials provided.” *Id.* at 1106. But in Texas, there is no such process because “the county officials that verify signatures are untrained.” Compl. ¶ 97. *Lemons* is also inapposite as to the process afforded after a signature mismatch is determined.

¹⁵ The Secretary contends that *Bush v. Gore*, 531 U.S. 98 (2000) does not advance Plaintiffs’ equal protection claim, Dkt. 17 at 20, 24, but that argument goes to the merits of Plaintiffs’ case. It does not speak to the sufficiency of Plaintiffs’ allegations, which is all that is at issue here.

¹⁶ Plaintiffs do not pursue a procedural due process claim with respect to the Voter Assistance Ban. The substance of Plaintiffs’ Third Claim for Relief, Compl. ¶¶ 125-127, only addresses the Signature Match Requirement. The mention of “Voter Assistance Ban” in the heading is inadvertent. While Plaintiffs do not believe doing so is necessary, they could amend their complaint at the Court’s direction upon resolution of this motion to resolve any ambiguity.

Lemons did not, as the Secretary asserts, suggest that no notice or cure process was needed to address a signature mismatch determination *for votes*. See Dkt. 17 at 24. Rather, the plaintiffs in *Lemons* argued that the ‘cure’ process that applied to mail-in ballots in Oregon should apply to the petition signatures at issue in *Lemons*, which the Ninth Circuit said was unnecessary. But the Court said nothing about whether the cure process for *ballots* determined to have a signature mismatch provided due process. “Unsurprisingly, courts have held that the lack of an opportunity to cure mail-in ballot rejections, which disenfranchises thousands of voters, is a serious burden on the right to vote.” *Richardson* Order, Ex. A at Appx. 22 (quotation marks omitted) (citing cases).

Here, the interest Plaintiffs allege is affected by the Signature Match Requirement is the liberty interest in voting and in having one’s vote counted, Compl. ¶¶ 126-127, which cannot be denied without due process. See *United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *aff’d*, 384 U.S. 155 (“[I]t cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.”); see also *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 215 (D.N.H. 2018) (“[A] voter has a sufficient liberty interest once the State permits voters to vote absentee.”) (quotation marks omitted). “[O]nce the state creates an absentee voting regime, they ‘must administer it in accordance with the Constitution.’” *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (quoting *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006)). Plaintiffs validly state a due process claim to determine whether that is occurring here.

Ultimately, a procedural due process claim is not appropriate for disposition at the pleading stage because. “[M]ost of the Secretary’s arguments for dismissal would require the Court to balance and evaluate the parties’ associated burdens, interest and justifications,” but doing so at the motion to dismiss stage “would be improper” since “the Court must accept Plaintiffs’ factual

allegations as true as part of the 12(b)(6) analysis, and no factual record has been developed at this stage.” *Richardson* Order, Ex. A at Appx. 22.

4. Poll tax claim (Postage Tax)

The Secretary wrongly argues that Plaintiffs cannot state a postage tax claim because there is no postage tax. Her cavalier assertion that “any Texas voter who finds voting by mail inconvenient is free to vote in person,” Dkt. 17 at 11, turns a blind eye to the real physical limitations some voters face and the grave public health concerns gripping our entire nation during the ongoing pandemic. There is an unavoidable monetary cost to vote for voters who are not able to vote in person or hand deliver their ballots, including individuals who are disabled or incapacitated from COVID-19 or otherwise. For those voters, neither in-person voting nor hand delivery of mail ballots is a realistic option. The Secretary does not dispute this, nor does she seriously dispute that it costs money to cast an absentee ballot as a general principal.

The Supreme Court has unequivocally held that “voting cannot hinge on ability to pay . . . for it is a ‘fundamental political right . . . preservative of all rights.’” *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 n.14 (1996) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). This analysis is the same regardless of whether a voter can pay, which undermines the Secretary’s de minimis burden argument. *See Harper*, 383 U.S. at 668 (holding that poll taxes, even if not burdensome for the average voter, violate Fourteenth Amendment because of burdens they impose on poor voters). And finally, the Secretary’s assertion that the Postage Tax surely must be constitutional because other states have similar requirements defies reason: that rationale would not have fared any better for anti-miscegenation laws in the 1970s as it should here. Plaintiffs have stated a poll tax claim.

CONCLUSION

Plaintiffs respectfully request that the Court deny the Secretary’s Motion to Dismiss.

Dated: June 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 17, 2020, and that all counsel of record were served by CM/ECF.

/s/ Skylar M. Howton

**THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE, ELLEN SWEETS, BENNY ALEXANDER, GEORGE MORGAN, VOTO LATINO, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and TEXAS ALLIANCE FOR RETIRED AMERICANS,

Plaintiffs,

v.

RUTH HUGHS, in her official capacity as Texas Secretary of State, Defendants.

Civil Case No. 5:20-cv-00577

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

APPENDIX IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Exhibit	Document Description	Page Numbers
A	Order Denying Motion to Dismiss in <i>Richardson v. Hancock</i> , Case No. 5:19-cv-00963-OLG, (W.D. Tex. Dec. 23, 2019) at ECF No. 41 (" <i>Richardson Order</i> ")	Appendix 1-33
B	Declaration of Linda Jann Lewis	Appendix 34-37
C	Declaration of Ellen Sweets	Appendix 38-41
D	Declaration of Benny Alexander	Appendix 42-44
E	Declaration of George Morgan	Appendix 45-49
F	Declaration of Maria Teresa Kumar	Appendix 50-54
G	Declaration of Judy Bryant	Appendix 55-58

H	Declaration of Gary Bledsoe	Appendix 59-62
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Dated: June 17, 2020

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**Pro hac vice applications pending*

CERTIFICATE OF SERVICE

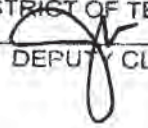
I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 17, 2020, and that all counsel of record were served by CM/ECF.

/s/ Skylar M. Howton

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

FILED

DEC 23 2019

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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DR. GEORGE RICHARDSON, ROSALIE
WEISFELD, AUSTIN JUSTICE
COALITION, COALITION OF TEXANS
WITH DISABILITIES, MOVE TEXAS
CIVIC FUND, LEAGUE OF WOMEN
VOTERS OF TEXAS, and AMERICAN GI
FORUM OF TEXAS, INC.,

Plaintiffs,

v.

TEXAS SECRETARY OF STATE, TRUDY
HANCOCK, in her official capacity as
BRAZOS COUNTY ELECTIONS
ADMINISTRATOR, and PERLA LARA, in
her official capacity as CITY OF
MCALLEN, TEXAS SECRETARY,

Defendants.

Civil No. SA-19-cv-00963-OLG

ORDER

On this date, the Court considered Defendants' motions to dismiss (docket nos. 27, 29 & 30). Having considered the pending motions and the parties' briefing, the Court concludes that the motions should be DENIED.

BACKGROUND

This case arises from provisions of the Texas Election Code (the "Election Code") related to the process of voting by mail. Before addressing the merits of the pending motions, the Court will briefly describe the parties and the relevant allegations.¹

¹ The background provided in this Section is based on the allegations asserted in Plaintiffs' Original Complaint. See docket no. 1 (the "Complaint").

I. Alleged Rejection of Mail-In Ballots

Like many states, Texas offers certain voters the opportunity to vote by mail. Specifically, Texas offers the opportunity to vote by mail to voters who are outside of their county during elections, voters with disabilities, voters 65 years-of-age or older, and certain voters confined in jail but otherwise eligible to vote. *See* Tex. Elec. Code §§ 82.001-.004.

In order to vote by mail, an eligible voter must first request a mail-in ballot by completing a mail-in ballot application at least 11 days before the election day. *Id.* at §§ 84.001 & 84.007. In order to cast his or her vote by mail, the voter must mark the ballot, place it in the official ballot envelope provided by the county, seal the official ballot envelope, place the official ballot envelope in the carrier envelope provided by the county, seal the carrier envelope, and sign the certificate on the carrier envelope. *Id.* at § 86.005(a)-(c). Specifically, the carrier envelope certificate requires the voter to “certify that the enclosed ballot expresses [the voter’s] wishes independent of any dictation or undue persuasion by any person,” and includes a line for the voter’s signature across the flap of the envelope. *Id.* at § 86.013(c). The carrier envelope then must be returned to the county in a timely manner. *Id.* at §§ 86.006(a) & 86.013(c).

Upon receipt of a mail-in ballot, the Election Code instructs each local jurisdiction’s Early Voting Ballot Board (“EVBB”) or Signature Verification Committee (“SVC”) to open the ballot envelope and determine whether to accept or reject the voter’s ballot.² *See id.* at §§ 87.001,

² The signature-comparison process is generally conducted by the Early Voting Ballot Board, a statutorily required board established in each county that includes representatives from county parties. *See generally* Tex. Elec. Code § 87.001. However, the local jurisdiction’s Early Voting Clerk (“EVC”) may determine that a Signature Verification Committee should be established, in which case the SVC will perform the signature reviews rather than the EVBB. *See generally id.* at § 87.027. An SVC is also mandatory if the EVC receives a timely petition of at least 15 registered voters requesting such a committee. *Id.* at § 87.027(a-1). An SVC is composed of at least five members and, “[i]n an election in which party alignment is indicated on the ballot,” must include at least two members designated by each county party on the ballot in equal numbers. *Id.* at

87.027(a-1) & 87.041. The Section states that a ballot may only be accepted if various conditions are satisfied. *Id.* at § 87.041(b). One such provision, which is central to this lawsuit, states that the ballot may only be accepted if “neither the voter’s signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness.” *Id.* at § 87.041(b)(3). As a result of that provision, each EVBB or SVC is instructed to reject a ballot if the EVBB or SVC concludes that a signature on the carrier envelope or ballot was “executed by a person other than the voter.” *Id.* The Election Code provides guidance as to which signatures an EVBB or SVC should use for the purposes of comparison, *see id.* at § 87.027(i), (j), but the Election Code contains no guidance as to the appropriate procedure or standard for determining that two signatures do not match, nor does it require that EVBBs’ or SVCs’ members receive training in evaluating signatures. *See* docket no. 1 ¶ 41. As a result, Plaintiffs allege that the standard for evaluating signature matches will necessarily vary from county to county, panel to panel, and even from meeting to meeting or ballot to ballot within the same committee panel. *See id.* Plaintiffs further note that the review process cannot be performed anonymously, as the EVBB or SVC necessarily knows the identity of the voter when determining whether a ballot should be accepted or rejected. *See id.* at ¶ 42.

If a ballot is rejected on the basis of the EVBB’s or SVC’s signature comparison, the Election Code only requires that the voter be notified about the rejection of his or her ballot within 10 days following the election. *Id.* at § 87.0431(a). The Election Code does not require local jurisdictions to provide a specific opportunity for the voter to verify or prove that he or she did indeed sign the relevant documents or challenge the signature verification at any time before

§ 87.027(d). According to the Complaint, SVCs are usually established in larger counties, but may also appear in many smaller ones. *See* docket no. 1 ¶ 38.

rejection.³ *See* docket no. 1 ¶ 47. Thus, according to Plaintiffs, a “voter whose ballot is rejected is not given any notice of [his or her] rejection prior to the rejection, any opportunity to cure [his or her] ballot, or any ability to contest the decision of the EVBB or SVC since counties have until 10 days after the Election Day to notify the voter of a rejected mail-in ballot.” *Id.*

Through these procedures, Plaintiffs allege that Texas counties rejected at least 1,873 mail-in ballots during the 2018 general election and at least 1,567 mail-in ballots during the 2016 general election solely on the basis of mismatching signatures. *See* docket no. 1 ¶ 1. Plaintiffs allege that these procedures (and the resulting improper rejection of votes) disenfranchise certain members of the groups who are explicitly eligible by statute to vote by mail. Finally, Plaintiffs note that certain of those specific groups, namely the elderly and people who are disabled, are those most likely to have signature variations that could cause improper rejection of a ballot. *See id.* at ¶ 46.

II. The Parties

Plaintiffs in this case include both individuals who had their votes rejected on the basis of alleged signature mismatches and various organizations whose members or whose services are allegedly affected by Texas’ mail-in voting procedures.

According to the Complaint, Plaintiff Dr. George Richardson (“Richardson”) had his ballot rejected by Brazos County officials during the 2018 general election on the basis of an alleged signature mismatch.⁴ *See* docket no. 1 ¶ 10. Similarly, during a city run-off election in 2019, the City of McAllen rejected Plaintiff Rosalie Weisfeld’s (“Weisfeld,” and with Richardson, the

³ Instead, the Election Code states that a “county election officer may petition a district court for injunctive or other relief as the court determines appropriate” if the county election officer “determines a ballot was incorrectly rejected or accepted by the [EVBB].” *Id.* at § 87.127(a). However, the language of the code appears to give the election officer discretion as to whether to file such a petition on a voter’s behalf.

⁴ The Complaint further alleges that Richardson is a doctor and that his signature “has been used to prescribe countless medications.” *See* docket no. 1 ¶ 10.

“Individual Plaintiffs”) mail-in ballot on the same basis. *See id.* at ¶ 11. The Complaint alleges that Richardson and Weisfeld each received a letter following the respective election notifying them that their ballot had been rejected on the basis of an alleged signature mismatch. *See id.* at ¶¶ 10-11. The Individual Plaintiffs allege that they would have confirmed that the signatures on the ballots were their own had they been given timely notice and the opportunity to do so. *See id.*

Plaintiff Austin Justice Coalition (“AJC”) is a non-partisan, non-profit organization that—among other services—operates the #ProjectOrange campaign, which involves registering eligible voters incarcerated at the Travis County Jail and providing support in requesting and submitting mail-in ballots. *See id.* at ¶ 12. Plaintiff Coalition of Texans with Disabilities (“CTD”) is an organization that “works to ensure that people with disabilities may live, work, learn, play, and participate fully in the community of their choice.” *See id.* at ¶ 16. Among other things, CTD expends resources informing voters statewide about their ability to vote by mail-in ballot and explaining the rules and procedures for doing so. *See id.* Plaintiff MOVE Texas Civic Fund (“MOVE”) is a non-partisan, non-profit organization that, among other things, actively works to register eligible young people to vote at various college campuses and to assist them with voting. *See id.* at ¶ 20. Because college students are often eligible for mail-in voting because they are away from their counties of residence while attending school, MOVE provides various types of support to students wishing to vote by mail. *See id.* at ¶¶ 20-22. Plaintiff League of Women Voters of Texas (“LWV”) is a non-partisan, non-profit organization that works to register eligible individuals to vote and to ensure that they actually cast a ballot that counts. *See id.* at ¶ 24. Among other activities, LWV expends resources to educate Texans about mail-in ballots and to provide support to eligible voters using such ballots. *See id.* at ¶¶ 24-25. Finally, Plaintiff American GI Forum of Texas, Inc. (“GI Forum”) is an organization whose membership includes significant

numbers of voters who are eligible to vote by mail because they are: (1) classified as disabled veterans; (2) military retirees 65 years-of-age or older; and/or (3) active duty service members (and/or their family members) who are stationed away from their county of residence in Texas. *See id.* at ¶ 28. GI Forum and its constituent chapters expend resources to register eligible Texas veterans and servicemembers (and their family members) to vote and to ensure that they actually cast a ballot that counts. *See id.* at ¶¶ 28-29.

Defendant Texas Secretary of State (the “Secretary”) is the Chief Election Officer of the State of Texas (the “State”). Tex. Elec. Code § 31.001(a). In this role, Plaintiffs allege that the Secretary is responsible for enforcing the State’s elections statutes. *See* docket no. 1 ¶ 32. Plaintiffs also allege that the Secretary routinely issues guidance to the county registrars of all 254 Texas counties on various elections procedures. *See id.* Defendant Trudy Hancock (“Hancock”) is the Brazos County Elections Administrator (“Brazos EA”), and she is sued in her official capacity for the manner in which she implements the voting procedures that are at issue in this action. *See id.* at ¶ 33. Finally, Defendant Perla Lara (“Lara”) is the Secretary of the City of McAllen, Texas (“McAllen City Secretary,” and, collectively, with Brazos EA, the “Local Defendants”). *See id.* at ¶ 34. The McAllen City Secretary is responsible for the administration of elections conducted within the City of McAllen, and Lara is sued in her official capacity for the manner in which she implements the voting procedures that are at issue in this action. *See id.*

III. The Pending Claims and Motions

On August 7, 2019, Plaintiffs filed the present action seeking declaratory and injunctive relief against Defendants. *See* docket no. 1. Plaintiffs’ Complaint asserts the following causes of action: (1) a claim alleging the violation of the Due Process Clause of the Fourteenth Amendment for Defendants’ alleged failure to provide pre-rejection notice and an opportunity to cure to voters

whose ballots are rejected on the basis of an alleged signature mismatch; (2) a claim alleging the violation of the Equal Protection Clause of the Fourteenth Amendment due to an alleged severe burden that has been placed on voters that is not justified by a legitimate government interest; (3) a separate claim alleging the violation of the Equal Protection Clause of the Fourteenth Amendment due to the Secretary's, State's and/or Local Defendants' failure to provide any uniform guidelines or principles regarding the comparison of signatures; and (4) a claim asserted only by Plaintiff CTD alleging violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, *et seq.*, and the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 794.

In response to Plaintiffs' claims, each Defendant filed a motion to dismiss. The McAllen City Secretary's Motion to Dismiss essentially asserts that the McAllen City Secretary is an improper defendant. *See* docket no. 27 (the "McAllen Motion"). Specifically, the McAllen Motion states that the McAllen City Secretary merely complies with and enforces state laws and regulations and "has no role in interpreting or litigating the constitutionality of state law" nor does she "have the authority to defend it." *See* docket no. 27 ¶ 2.9. The McAllen City Secretary therefore asserts that the claims should proceed only against state officials. *See id.* at ¶ 2.8. Similarly, the Brazos EA's Motion to Dismiss also essentially argues that the Brazos EA is an improper defendant. *See* docket no. 29 (the "Brazos Motion"). Specifically, the Brazos Motion contends that the Complaint specifically fails to assert claims against the Brazos EA, and that the Brazos EA is an improper Defendant because the allegations "do not allege that [the Brazos EA] did anything other than follow the law." *Id.* at p. 4. Thus, the Brazos Motion asserts that the Brazos EA has no authority to remedy the Plaintiffs' complaints. *See id.* Finally, the Secretary's motion to dismiss essentially *also* argues that the Secretary is an improper Defendant because "Plaintiffs' alleged injuries are neither caused by nor redressable through her." Docket no. 30 (the "Secretary's

Motion”). Thus, the Secretary argues that Plaintiffs’ claims against the Secretary should be dismissed for lack of standing, as local election authorities have the authority to provide Plaintiffs with the relief requested. *See id.* at pp. 6-11. Additionally, the Secretary argues that—even assuming Plaintiffs have standing—the claims should be dismissed on the basis that Plaintiffs’ Complaint fails to state any plausible claim for relief. *See id.* at pp. 12-20. Plaintiffs filed a combined response in opposition to the three motions, and each Defendant filed a reply brief in support of the respective motions. *See* docket nos. 32, 33, 34 & 35.

Below, the Court addresses the merits of each motion.

DISCUSSION

I. Defendants’ Motions to Dismiss for Lack of Standing

The Secretary’s Motion contends that Plaintiffs lack standing to bring claims against the Secretary, and thus, the motion seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(1). *See* docket no. 30 pp. 6-11. The Brazos Motion also raises standing arguments, but states that its motion is filed pursuant to Fed. R. Civ. P. 12(b)(6). *See* docket no. 29 p. 4. The McAllen City Secretary similarly moves pursuant to Rule 12(b)(6), but also asserts arguments disputing whether the McAllen City Secretary is a proper defendant in this action. *See* docket no. 27 pp. 3-6. All three motions either explicitly or implicitly implicate Article III, and thus, the Court will address them together pursuant to Rule 12(b)(1) before moving to any analysis pursuant to Rule 12(b)(6). *See, e.g., Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011) (noting the proper vehicle to challenge Article III standing, i.e., a jurisdictional question, is a motion to dismiss under Rule 12(b)(1)).

A. Legal Standard

The constitutional requirement of standing contains three elements: (1) the plaintiff must have suffered an injury-in-fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The same requirements also apply to entities seeking to establish that they have “associational” or “organizational” standing. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 609-10 (5th Cir. 2017).

“Associational standing” is derivative of the standing of the association’s members, requiring that they have standing and that the interests the association seeks to protect be germane to its purpose. By contrast, “organizational standing” does not depend on the standing of the organization’s members. The organization can establish standing in its own name if it meets the same standing test that applies to individuals.

Id. at 610 (citations and some internal quotation marks omitted).

To show standing “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss [a court may] presume that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561. “[T]he injury in fact requirement under Article III is qualitative, not quantitative, in nature,” and the injury “need not be substantial.” *OCA-Greater Houston*, 867 F.3d at 612 (citations, internal quotation marks and brackets omitted). Thus, while an injury-in-fact must be (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical,” *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted), “it need not measure more than an ‘identifiable trifle.’” *OCA-Greater Houston*, 867 F.3d at 612 (quoting *Ass’n of Cmty Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999)).

B. Plaintiffs' Injury-in-Fact

The Secretary's Motion asserts that Plaintiffs AJC, MOVE, CTD, LWV and GI Forum do not have standing to assert their constitutional claims because they have failed to allege that they suffered an injury-in-fact such that they can assert claims against the Secretary. *See* docket no. 30 pp. 6-8. Plaintiffs AJC, MOVE, CTD, LWV, and GI Forum contend that they have organizational standing to assert constitutional claims against Defendants. *See* docket no. 1 ¶¶ 12, 15, 20, 24 & 28. Additionally, Plaintiffs CTD, LWV and GI Forum also appear to contend that they have associational standing to assert certain claims on behalf of their members. *See id.* at ¶¶ 15, 24 & 28.

As discussed above, Plaintiffs do not have a difficult standard to satisfy in order to adequately *allege* an injury-in-fact at the motion to dismiss stage. With respect to "organizational standing," the Fifth Circuit has held that "an organization has standing to sue on its own behalf where it devotes resources to counteract a defendant's allegedly unlawful practices." *Fowler*, 178 F.3d at 360. Indeed, if a defendant's actions "perceptibly impair" an organization in its provision of services, "there can be no question that the organization has suffered injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Here, Plaintiffs AJC, MOVE, CTD, and LWV have each alleged that they have been forced to expend "additional resources" in order to help counteract the impacts of Texas' allegedly unlawful mail-in ballot procedures.⁵ *See* docket no. 1 ¶¶ 13, 14, 18, 23 & 26. Such efforts help

⁵ Defendant Secretary asserts that this is a mere "threadbare recital" which is insufficient to satisfy the requisite pleading standard. *See* docket no. 35 p. 3. To the contrary, however, Plaintiffs' Complaint provides examples of certain specific activities in which Plaintiffs engage allegedly as a result of the Texas mail-in voting procedures. As but one example, the Complaint specifically alleges the following with respect to Plaintiff LWV:

LWV must expend additional staff and volunteer time and resources instructing voters to write out signatures neatly and have the signatures match each other as

reduce the chance of an improper ballot rejection, and Plaintiffs allege that they would not have to expend these resources if the mail-in ballot procedures provided the safeguards of uniform application, pre-rejection notice, and an opportunity to cure. *See id.*; *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1335 (N.D. Ga. 2018), *appeal dismissed*, sub nom. *Martin v. Sec'y of State of Georgia*, 2018 WL 7139247 (11th Cir. Dec. 11, 2018) (finding organizations had standing because the groups “will not bear the same burden of assisting and warning voters once the State is required to assist voters whose ballots are challenged as illegitimate and once the urgency of warning voters is diminished by way of due process protections”). Defendant Secretary appears to contest the exact extent to which the plaintiff organizations’ activities were “perceptibly impaired” by the State’s mail-in ballot procedures, *see* docket no. 35 p. 3, but the argument ignores that the Court must accept Plaintiffs’ allegations as true at this stage. Thus, it is not appropriate at this stage for the Court to delve into the precise extent to which each organization has actually expended resources outside of those that would otherwise be spent in order to counteract the State’s mail-in ballot procedures. Instead, the Court must accept the allegation that Plaintiffs AJC, MOVE, CTD, and LWV have been forced to expend “additional resources” when “providing instruction and support on mail-in ballots” in order to counteract the State’s policies.⁶ *See* docket no. 1 ¶¶ 14, 18,

much as possible in PowerPoint presentations and scripts prepared for its members and local-area League of Women Voters organizations to use when educating and providing support to mail-in ballot voters. The resources diverted for these purposes are transferred away from LWV’s other voting-related activities.

Docket no. 1 ¶ 26.

⁶ The Court notes that Plaintiff GI Forum does not allege that it must expend additional resources in light of Texas’ allegedly unlawful mail-in voting procedures. For that reason, the allegations in the Complaint less clearly support Plaintiffs’ position that GI Forum has suffered an injury-in-fact such that it has organizational standing to assert its claims in this case. However, the practical impact of this conclusion is minimal because, as explained in the next paragraph, the Court concludes that GI Forum has adequately *alleged* that it has associational standing to assert claims on behalf of its members who have allegedly suffered an injury-in-fact.

23 & 26. And based on those allegations, Plaintiffs AJC, MOVE, CTD, and LWV have each adequately alleged that they have organizational standing to pursue the asserted claims.⁷ *See, e.g., Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (quoting *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (“[A]n organization suffers an injury in fact when a statute ‘compel[s]’ it to divert more resources to accomplishing its goals” and “[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury.”)).

Similarly, with respect to Plaintiffs CTD’s, LWV’s and GI Forum’s assertion of “associational standing,” the Court concludes that each has satisfied the requisite *pleading* standard. Defendant Secretary correctly notes that Plaintiffs have not alleged that *specific* members each organization had their votes improperly rejected due to Texas’ mail-in ballot procedures. *See* docket no. 35 p. 4. Therefore, the Secretary’s Motion asserts that Plaintiffs CTD, LWV, and GI Forum “ha[ve] failed to allege facts establishing that [their] members otherwise have standing to sue in their own right.”⁸ Docket no. 30 p. 11-12. But having reviewed the Complaint, it is clear that Plaintiffs allege that the individual members of CTD, LWV and GI Forum “regularly vote by mail.” Docket no. 1 ¶¶ 19, 27 & 31. The allegations also make clear that the membership of these organizations is comprised in significant part by individuals who are likely to be impacted by the

⁷ The Court notes that Defendant may move again at later stages of the litigation if the evidentiary record ultimately supports the Secretary’s contention that certain or all of the organizational Plaintiffs do not have organizational standing because they have not suffered a cognizable injury-in-fact.

⁸ Plaintiffs’ response correctly notes that Defendant Secretary’s Motion only explicitly challenges Plaintiff CTD’s associational standing. *See* docket no. 32 p. 5. However, in its reply, the Secretary makes clear that it intended such an argument to apply equally to Plaintiffs LWV and GI Forum. *See* docket no. 35 p. 4 n.4. Ultimately, the exact scope of the Secretary’s Motion need not be addressed because the Court concludes that each of the three parties adequately alleges an injury-in-fact for the purposes of associational standing.

relevant policies at issue. *See, e.g.*, docket no. 1 ¶ 28. Thus, because the Court must assume that these “general allegations embrace those specific facts that are necessary to support the claim,” *Lujan*, 504 U.S. at 561, the Court will infer at this stage that at least certain members of CTD, LWV and GI Forum have suffered an injury-in-fact as a result of Texas’ mail-in ballot signature-comparison procedures. For that reason, the Court finds that the allegations plausibly support a claim for which Plaintiffs CTD, LWV, and GI Forum have associational standing based on injuries allegedly suffered by their members.⁹

Accordingly, the Court concludes that each Plaintiff has adequately alleged injury-in-fact such that each Plaintiff may assert claims on its own behalf and/or on the behalf of its members.¹⁰ Thus, the Court will consider the other relevant factors with respect to Plaintiffs’ standing.

C. Causation and Redressability—Texas Secretary of State

Defendant Secretary asserts that no Plaintiff has asserted that any applicable injury-in-fact was caused by the Secretary’s actions because any alleged injury resulted from local determinations of signature mismatch rather than any action by the Secretary. *See* docket no. 30 pp. 9-10. Thus, the Secretary’s Motion asserts that “Plaintiffs’ alleged injuries turn on the actions of local election officials and are not traceable to the Secretary.” *Id.* Similarly, the Secretary asserts that it is the local election officials who are in a position to provide Plaintiffs with redressability by (i) ceasing the rejection of ballots, (ii) providing pre-rejection notice, and/or (iii) acting in the case of an improperly rejected ballot. *See id.* at pp. 11.

⁹ Again, Defendants certainly may move again on this issue if discovery indicates that CTD, LWV, and GI Forum are not in a position to assert claims on behalf of injured members, including because their members have not or will not suffer an injury in the form of an improperly rejected ballot.

¹⁰ The Secretary’s Motion does not contend that the Individual Plaintiffs did not suffer an injury-in-fact, and thus, the Court will not address that issue as part of this Order.

Having reviewed the allegations and Plaintiffs' facial challenges to Texas' mail-in ballot signature-comparison procedures, the Court concludes that Plaintiffs have satisfied the causation and redressability pleading requirements such that Defendant Secretary is a proper defendant in the lawsuit. The Texas Election Code names Defendant Secretary as the "chief election officer of the state" and empowers her to (i) "assist and advise all election authorities with regard to the application, operation, and interpretation of [the] code" and (ii) "obtain and maintain uniformity in the application, operation, and interpretation of [the] code and of the election laws outside [the] code." Tex. Elec. Code §§ 31.001(a), 31.003 & 31.004. For that reason, the Fifth Circuit has held that "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State." *OCA-Greater Houston*, 867 F.3d at 613 (citing Tex. Elec. Code §§ 31.001(a)). Importantly, the Fifth Circuit has also made clear that this is true irrespective of whether a local official is also responsible for enforcing the statute in question. *See, e.g., OCA-Greater Houston*, 867 F.3d at 612-13 (rejecting Secretary's argument that the plaintiffs had standing only against local government officials who enforced election code restrictions regarding eligibility to serve as interpreter). Texas law plainly states that it is the Secretary's duty to "assist and advise all election authorities" and to "obtain and maintain uniformity" in the interpretation and application of the Election Code, and such duties no doubt include the obligation to ensure that the provisions of the Election Code are being enforced in a way that is consistent with the United States Constitution and federal law. For that reason, it is apparent that—if valid—Plaintiffs' alleged complaints are both traceable to the action (or inaction) of the Secretary and redressable by the Secretary.

Accordingly, the Court concludes that Plaintiffs have satisfied the causation and redressability requirements as to their claims against Defendant Secretary such that—at least at the present stage—Defendant Secretary is a proper defendant in the litigation.

D. Causation and Redressability—Brazos EA and McAllen City Secretary

The Brazos Motion and McAllen Motion take the opposite position from that of the Secretary's Motion. Specifically, the Brazos Motion argues that the Brazos EA was not the cause of Plaintiffs' injuries because she "did not review the signatures in question" or create the state policies in question. *See* docket no. 5. Indeed, the Brazos Motion states that "Plaintiffs do not make a single allegation of wrongdoing against Hancock, other than that she followed Texas law." *Id.* at p. 5. Additionally, the Brazos Motion argues that the Brazos EA "has no authority to remedy the complaint" because she could not provide Plaintiffs with the relief they request "without violating Texas law." *Id.* at p. 6. Similarly, the McAllen Motion states that the Complaint "points to Defendant Lara's adherence to state laws" and is "completely devoid of any allegation of wrongdoing on the part of the McAllen City Secretary." Docket no. 27 p. 4. The McAllen Motion further argues that the "McAllen City Secretary does not have the authority to revise or defend state law," and thus, that "the suit should be brought against state officials." *Id.* at p. 5.

Having reviewed the record, the Court finds that Defendants Brazos EA's and McAllen City Secretary's arguments are—at least at this stage—without merit. Defendants Brazos EA's and McAllen City Secretary's assertions ignore that "constitutional challenges are often brought against local entities or officials enforcing statewide laws they played no role in creating." *Voting for America, Inc. v. Andrade*, 888 F. Supp. 2d 816, 832-33 (S.D. Tex. 2012), *rev'd on other grounds*, sub nom. *Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (collecting cases). More specifically, courts have routinely held that both state-level and local officials may be proper

defendants when both play a role in the implementation and enforcement of a challenged election law. *See id.* at 829-33 (holding that county registrar and Secretary of State were both proper defendants for plaintiffs' claims regarding voter registration drives); *see also True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 712 (S.D. Miss. 2014) (holding that both county defendants and the Secretary of State were properly named in National Voter Registration Act lawsuit); *Mark Wandering Med. v. McCulloch*, CV 12-135-BLG-DWM, 2014 WL 12588302, at *3-4 (D. Mont. Mar. 26, 2014) (finding that plaintiffs had standing to bring voting rights claims against both county officials and the Secretary of State). Importantly, because it is the local official who often "enforces the laws that [the plaintiffs] contend cause them injury, an injunction against [the local official] would directly redress [the] alleged injury." *Voting for Am.*, 888 F. Supp. 2d at 832-33. For that reason, and as the Fifth Circuit has clearly explained, a defendant may still satisfy the causation and redressability standards for Article III standing if the defendant has "definite responsibilities relating to the application [of the statute]" even if the defendant may be "far from the sole participant in the application of [a] challenged statute." *K.P. v. LeBlanc*, 627 F.3d 115, 123-24 (5th Cir. 2010).

Applying these standards, it is clear that Plaintiffs' allegations satisfy both the causation and redressability requirements necessary to make Brazos EA and McAllen City Secretary proper defendants in this litigation. The allegations in the Complaint indicate that Brazos EA and McAllen City Secretary have a designated role as the county election officer for all elections ordered by their county and city respectively. *See* docket no. 1 ¶¶ 33 & 34; Tex. Elec. Code § 83.002, 83.005 & 31.043.¹¹ Importantly, the allegations indicate both that the Election Code provides the county

¹¹ As part of its analysis of the pending motions, the Court may consider all relevant provisions of the Texas Election Code. *See United States v. Schmitt*, 748 F.2d 249, 255-56 (5th Cir. 1984). Section 83.002 of the Texas Election Code states that the county clerk is the EVC for "the general election for state and county officers and any other countywide election held at county expense,"

election officer with broad authority over the mail-in ballot voting process and that Defendants Brazos EA and/or McAllen City Secretary have the authority to implement additional safeguards that may have prevented Plaintiffs' injuries in this case and may provide forms of relief going forward.¹² See, e.g., docket no. 1 ¶¶ 38 & 60. Accepting that inference with respect to the Local Defendants' authority, as the Court must do at this stage, it is clear that the Local Defendants satisfy the redressability and causation pleading requirements for Plaintiffs' Article III standing. Indeed, at least one other court has found this type of authority is sufficient to render local defendants *liable* for the application of unconstitutional state laws governing mail-in ballot signature-comparison procedures. See, e.g., *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646 (N.D. Ill. March 13, 2006) (finding county clerk who was responsible for most aspects of the mail-in ballot process, except matching signatures, liable for violating Fourteenth Amendment by failing to provide pre-deprivation notice and hearing to mail-in ballot voters).

Accordingly, because the Court finds that Plaintiffs' alleged injuries are both traceable to actions (and/or inaction) by the Local Defendants and potentially redressable by the Local

and Section 31.043 of the Election Code states that the county elections administrator shall perform "the duties and functions placed on the county clerk by this code." Similarly, Section 83.005 of the Election Code states that "the city secretary is the early voting clerk for an election ordered by an authority of a city."

¹² Plaintiffs' response appears to confirm that indication. Specifically, the response asserts that the Election Code does not prohibit Brazos EA and/or McAllen City Secretary from (i) taking steps (such as training) to ensure uniformity with respect to signature comparisons and/or (ii) providing voters with pre-rejection notice of a signature mismatch and an opportunity to cure before actually rejecting the ballot. See docket no. 32 pp. 16-17. Indeed, although the EVBB and/or SVC are responsible for comparing signatures and sending formal notice of a ballot's rejection, the county election officer is generally responsible for most aspects of the mail-in ballot process. As an example, it appears that the Election Code formally gives the county election officer the ability to file a lawsuit challenging the EVBB or SVC's determination regarding a voter's signature. *Id.* at §§ 87.127(a).

Defendants' future conduct, the Court finds that Plaintiffs have adequately alleged standing to assert their claims against Defendants Brazos EA and McAllen City Secretary in this action.

II. Defendants' Motions to Dismiss for Failure to State a Claim

The various Defendants each also assert numerous bases on which they contend Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). The Secretary's Motion argues that Plaintiffs' due process and equal protection claims must be dismissed because the provisions of the Election Code at issue (i) do not impose a severe burden on the right to vote and/or (ii) are justified by the State's legitimate interests. *See* docket no. 30 pp. 14-19. The Secretary also seeks dismissal of Plaintiff CTD's claim asserted pursuant to the ADA and RA, contending that Texas law already provides reasonable accommodations to disabled voters. *See id.* at p. 20. Defendants Brazos EA and McAllen City Secretary seek dismissal of Plaintiffs' claims pursuant to Rule 12(b)(6) because certain claims fail to specifically name the Local Defendants and/or identify their alleged wrongdoing. *See* docket no. 27 pp. 4-5; docket no. 29 pp. 5-6. Finally, the Brazos Motion also argues that Plaintiff's prayer request is improper. *See* docket no. 29 pp. 6-7.

A. Legal Standard

Under Fed. R. Civ. P. 8(a), a complaint is considered well pled if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a) is considered in conjunction with Fed. R. Civ. P. 12(b)(6), which provides that a complaint may be dismissed if it "fails to state a claim upon which relief can be granted." Courts apply these rules through the process outlined by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) if, assuming the truth of all facts alleged in the complaint, it fails to state a "claim to relief that is plausible on its face." *Iqbal*, 556

U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In order to state a plausible claim to relief, the complaint must include “allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Those allegations may be “either direct or inferential.” *Id.* In applying Rule 12(b)(6), the Court must distinguish between pleadings of fact, which are presumed as true, and statements of legal conclusion, which are not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 679. “A plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief,’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265 (1986)). Throughout the Rule 12(b)(6) analysis, “[t]he complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff.” *Morgan v. Swanson*, 659 F.3d 359, 370 n.17 (5th Cir. 2011) (en banc) (quoting *Woodard v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005)).

B. Plaintiffs’ Due Process Claim

Plaintiffs’ due process claim alleges that Defendants have violated the Due Process Clause of the Fourteenth Amendment by failing to provide pre-rejection notice and an opportunity to cure to mail-in voters who have their votes rejected on the basis of an alleged signature mismatch. *See* docket no. 1 ¶¶ 52-61. Defendant Secretary asserts that the claim is subject to dismissal because (i) the relevant Election Code provisions do not impose a severe burden, (ii) any burden imposed is justified by the State’s interest, and that (iii) in any event, Plaintiffs failed to avail themselves of the post-election processes available to them. *See* docket no. 30 pp. 12-18.

As an initial matter, the parties dispute whether Plaintiffs’ due process claim is governed by the “*Matthews*” standard or “*Anderson/Burdick*” standard. *See Matthews v. Eldridge*, 424 U.S.

319, 225 (1976); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Plaintiffs contend that the *Matthews* framework should apply to the due process analysis, *see* docket no. 32 pp. 23-25, and Plaintiffs note that numerous courts evaluating due process claims related to mail-in voting procedures have evaluated the claims under that framework, which instructs the Court to balance the following considerations:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews, 424 U.S. at 335. The Secretary, on the other hand, contends that a more flexible standard—known as the “*Anderson/Burdick*” test—applies to the constitutional analysis of all state laws that allegedly burden the right to vote. Under the *Anderson/Burdick* test, a court “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). Strict scrutiny applies only when the right to vote is “subjected to ‘severe’ restrictions.” *Burdick*, 504 U.S. at 434. Where a law “imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.*; *see also Anderson*, 460 U.S. at 788. The parties appear to agree that such a standard should apply to the analysis of Plaintiffs’ equal protection claims, but the Secretary asserts that the *Anderson/Burdick* standard should also govern the analysis of Plaintiffs’ due process claim. *See* docket no. 30 pp. 13-14.

The argument for applying the *Matthews* test to Plaintiffs' due process claim is a strong one, as the framework explicitly references both "procedures" and potential "procedural safeguards." *Matthews*, 424 U.S. at 335. For that reason, the standard appears to be more directly applicable to due process claims premised on mail-in ballot procedures and/or the lack of procedural safeguards related to the mail-in voting process. Notably, it appears that multiple courts have applied the *Matthews* framework to substantially similar claims involving due process challenges to mail-in ballot signature-comparison procedures. *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214 (D.N.H. 2018); *Martin*, 341 F. Supp. 3d at 1338; *Zessar*, 2006 WL 642646 at *7. On the other hand, certain courts have stated that the *Anderson/Burdick* framework is meant to apply to all constitutional challenges to voting restrictions, including both due process claims and equal protection claims. *See, e.g., Duncan v. Husted*, 125 F. Supp. 3d 674, 679-80 (S.D. Ohio 2015), *aff'd* (Mar. 7, 2016) (stating that in the Sixth Circuit, "the *Anderson-Burdick* test serves as single standard for evaluating challenges to voting restrictions" including "First Amendment, Due Process Clause of the Fourteenth Amendment, and Equal Protection Clause of the Fourteenth Amendment claims"); *Weber v. Shelley*, 347 F.3d 1101, 1105-06 (9th Cir. 2003) (analyzing equal protection and due process challenges to touchscreen voting system without voter-verified paper trail under *Anderson* and *Burdick*). However, the Secretary has failed to cite any cases in which the *Anderson/Burdick* framework has been applied to an evaluation of a due process claim related to mail-in ballot procedures.

In any event, the Court need not specifically decide the issue at this stage, as the Court concludes that Plaintiffs have adequately alleged a due process claim against Defendants

regardless of whether the *Matthews* or *Anderson/Burdick* framework applies.¹³ As an initial matter, the Court notes that most of the Secretary's arguments for dismissal would require the Court to balance and evaluate the parties' asserted burdens, interests and justifications at the motion to dismiss stage. Doing so would be improper, however, as the Court must accept Plaintiffs' factual allegations as true at as part of the 12(b)(6) analysis, and no factual record has been developed at this stage.

With respect to the specific application of the *Anderson/Burdick* framework, the first step in the analysis requires the Court to consider the burden—if any—created by the relevant Texas Election Code provisions and/or their enforcement.¹⁴ Based on the allegations in Plaintiffs' Complaint, the burden created by the State's mail-in ballot procedures is a substantial one. Here, Plaintiffs allege that thousands of voters have been disenfranchised as a result of Texas' mail-in voting process and signature-matching procedures. Unsurprisingly, courts have held that the lack of an opportunity to cure mail-in ballot rejections, which disenfranchises thousands of voters, is a "serious burden on the right to vote." *Florida Democratic Party v. Detzner*, No. 4:16-cv-607-MW/CAS, 2016 WL 6090943, at *6 & n.11 (N.D. Fla. Oct. 16, 2016) (citing *Ne. Ohio Coal. For the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012)). Although the Secretary asserts that there are various safeguards that reduce any burden, each of the State's referenced procedures is alleged to have flaws that result in (or fail to prevent) disenfranchisement.¹⁵ Perhaps the most

¹³ Although the Court need not make such a determination as part of this Order, the parties should be prepared to provide additional briefing and/or argument as to the issue as the case progresses.

¹⁴ As discussed in the prior note, the Court has not determined that the *Anderson/Burdick* standard is the appropriate standard for analyzing the merits of Plaintiffs' due process claim. The Court is merely demonstrating that Plaintiffs have adequately *alleged* a due process claim against Defendants irrespective of whether the *Matthews* or *Anderson/Burdick* framework is applicable. See also note 20, *infra*.

¹⁵ For example, the Secretary argues that a provision that permits a witness signature—in lieu of the signature matching requirement—reduces the burden of the State's signature-comparison

telling allegations are those indicating that at least one of the named Individual Plaintiffs tried to cure the improper rejection of his ballot following post-election notice, and yet was unable to do so under the State's current procedures. *See* docket no. 1 ¶ 10; docket no. 32 p. 28. On that basis, this Court concludes that Plaintiffs have adequately alleged that the procedures in question impose a substantial burden on the right to vote.

The allegations—if accepted as true—also indicate that the State has no compelling justification for the existing voting procedures, such that the second factor of the *Anderson/Burdick* test is also satisfied for the purposes of the Rule 12(b)(6) analysis. To be clear, the Court agrees with the Secretary's general assertion that Texas "indisputably has a compelling interest in preserving the integrity of its election process" by preventing voter fraud. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). But Plaintiffs' due process allegations do not wholesale challenge Texas' decision to use signatures as one method for preventing voter fraud on certain mail-in ballots. Instead, Plaintiffs challenge the fact that Texas has instituted procedures that result in disenfranchisement because voters are not provided a meaningful opportunity to cure if a ballot is improperly rejected on the basis of mismatched signatures. Importantly, the Secretary's Motion offers no argument as to how the State's interest in preventing voter fraud is furthered by failing to provide pre-rejection notice

provisions. *See* docket no. 30 pp. 14-15. However, a review of the provision indicates that only certain individuals who vote by mail—namely those who certify that they are unable to sign the ballot "because of a physical disability or illiteracy"—are able to utilize the witness signature procedure. *See* Tex. Elec. Code § 1.011(a). Plaintiffs' response also notes that many voters may not have access to such a witness. *See* docket no. 32 p. 30. Moreover, although the Secretary notes that a voter is entitled to notice of a ballot's rejection within ten days following the election, such notice may be of little use to a voter whose ballot has *already* been rejected if it does not provide the voter with sufficient opportunity to seek relief. Tex. Elec. Code § 87.0431; docket no. 1 ¶ 44. And although it is true that a local election officer "may petition a district court for injunctive relief," such relief is discretionary, and the law does not appear to require election officers to pursue such action. *See id.* at § 87.127.

and an opportunity to cure.¹⁶ Indeed, Plaintiffs' allegations indicate that there is no compelling justification for Defendants' failure to provide an opportunity to cure, as the Secretary's stated concerns regarding voter fraud appear to be *inconsistent* with the State's apparent objections to the due process protections sought by Plaintiffs.¹⁷ Notably, although the State no doubt also has a compelling interest in preventing in-person voter fraud, the Complaint alleges that Texas presently provides pre-rejection notice and an opportunity to cure to voters who fail to comply with certain requirements for in-person voting. *See* docket no. 1 ¶ 59 (citing Tex. Elec. Code. § 65.0541, which states that voters who lack identification on election day may cast a provisional ballot and provide photo identification within six days of the election in order to have their ballot counted). The Secretary's briefing fails to explain why a form of pre-rejection notice and an opportunity to cure cannot be provided to mail-in voters as well.

Additionally, the Secretary's argument that "Plaintiffs disregarded the process available to them" would be an improper basis for dismissing the claim at this stage. *See* docket no. 30 p. 17. Specifically, the Secretary asserts that Tex. Elec. Code §§ 87.127(a) provided Plaintiffs with

¹⁶ The Secretary directs the Court to *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), in which the Ninth Circuit rejected due process and equal protection challenges to Oregon's signature-matching procedures for verifying citizens' signatures on petitions for ballot initiatives. *See* docket no. 30 pp. 16-17. In *Lemons*, however, the Ninth Circuit noted that signatures on petitions for "initiative and referenda . . . are often gathered by privately hired signature gatherers" which may be more likely to lead to fraudulent signatures. 538 F.3d at 1104. Moreover, a review of *Lemons* indicates that Oregon provided additional safeguards during the signature-comparison process that are not provided under the Texas Election Code. *Id.* at 1105. In light of the differences between the specific circumstances in *Lemons* and those at issue in this case, the Ninth Circuit's opinion in *Lemons* does not provide a basis for dismissing Plaintiffs' due process claims at this stage.

¹⁷ Here, "Defendants offer no satisfying explanation for why [the State] cannot have both a robust signature-match protection and a way to allow every eligible voter-by mail and provisional voter whose ballot is mistakenly rejected an opportunity to verify their identity and have their votes count." *Democratic Executive Comm. of Florida v. Lee*, 915 F.3d 1312, 1322 (11th Cir. 2019). If anything, "letting mismatched-signature voters cure their vote by proving their identity further prevents voter fraud—it allows supervisors of elections to confirm the identity of that voter before their vote is counted." *Fla. Democratic Party v. Detzner*, 2016 WL 6090943, at *7.

protection, such that “Plaintiffs could have raised their concerns of improper rejection to their county election officer” who could have then—at his or her discretion—chosen to file a lawsuit on the voter’s behalf. *See* docket no. 30 p. 17. As an initial matter, the Secretary fails to cite precedent for the proposition that an election officer’s *discretionary* ability to seek judicial relief affords process sufficient to cure the deprivation of the fundamental right to vote. Additionally, the Secretary’s argument depends on the Court adopting the Secretary’s assertion of the facts at the motion to dismiss stage, which would be improper *even if* the Secretary provided evidentiary support for its contentions. *See Iqbal*, 556 U.S. at 678. Instead, however, the Secretary’s assertion appears to ignore specific factual allegations contained in Plaintiffs’ Complaint which directly *contradict* the Secretary’s contention. Indeed, the Complaint alleges that Plaintiff Richardson did specifically notify an election official of Brazos County’s error, and county officials declined to pursue any relief on Richardson’s behalf. *See* docket no. 1 ¶ 10. Thus, at least at this stage, the Secretary’s argument lacks both legal and factual support.

Finally, to the extent either Local Defendant argues that Plaintiffs’ Complaint fails to state a due process claim against Brazos EA and/or McAllen City Secretary, such an argument is without merit.¹⁸ As an initial matter, Plaintiffs’ Complaint references conduct by “Defendants,” such that it is clear that the claim is asserted against the Local Defendants as well as the Secretary. *See, e.g.*, docket no. 1 ¶¶ 54, 56-57 & 60. Moreover, and as discussed in Section I.D, *supra*, it is the local election officers, such as Defendant Brazos EA and/or Defendant McAllen City Secretary, who allegedly enforce Texas election laws in a manner that has violated Plaintiffs’ due process rights.

¹⁸ The Brazos Motion asserts that “Hancock” is not specifically named in Count I, and that “Plaintiffs do not make a single allegation of wrongdoing against Hancock.” *See* docket no. 29 p. 5. Meanwhile, the McAllen Motion generally asserts that the Complaint is “devoid of any allegation of wrongdoing on the part of the McAllen City Secretary” and again asserts that state officials are the proper Defendants. *See* docket no. 27 pp. 4-5.

Further, Plaintiffs contend that the Local Defendants have broad powers under the Election Code that provide them with the authority to afford Plaintiffs additional procedural protections such as pre-rejection notice and/or an opportunity to cure. Accordingly, the Court concludes that Plaintiffs have adequately alleged a due process claim against the Local Defendants in addition to stating a claim against the Secretary.¹⁹

Accordingly, the Court finds that—even if the *Anderson/Burdick* standard is applied—Plaintiffs have adequately alleged a due process claim related to Defendants’ failure to provide Plaintiffs with pre-rejection notice and an opportunity to cure the improper rejection of mail-in ballots based on the State’s signature-comparison process.²⁰

¹⁹ To the extent that the Brazos Motion asserts that Plaintiffs’ prayer request is improper, *see* docket no. 29 pp. 6-7, the Court need not specifically consider the argument at this stage. Importantly, a Rule 12(b)(6) motion “tests the legal sufficiency of allegations,” and *even assuming* Plaintiffs’ specific request for relief is in some way improper, that request is not fatal to Plaintiffs’ pleading so long as the statement of the claim indicates that the Plaintiffs may be entitled to some form of relief. *See, e.g., Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1108 (8th Cir. 2011) (emphasis in original) (citations omitted) (reversing dismissal of complaint and noting that Rule 12(b)(6) dismissal is only appropriate “if it is clear that *no* relief could be granted under *any* set of facts that could be proved consistent with the allegations”); *Carcano v. Cooper*, 350 F. Supp. 3d 388, 422 n.27 (M.D.N.C. 2018) (“[A]n improperly-stated request for relief is not normally grounds for dismissal of a complaint.”); *Zurich Am. Ins. Co. v. Southern-Owners Ins. Co.*, Case No. 3:15-cv-01041-J-34PDB, 2018 WL 1071939, at *3 (M.D. Fla. Feb. 26, 2018) (“Indeed, a well-pleaded claim ought not be dismissed because a party misconceives the appropriate remedy.”). Because the Complaint in this case adequately alleges that Plaintiffs may be entitled to some relief, the Brazos Motion is denied to the extent it takes issue with Plaintiffs’ prayer request.

²⁰ In the event the *Mathews* test is the appropriate standard, it is even more apparent that Plaintiffs have adequately alleged a due process claim against Defendants. Indeed, multiple courts have awarded *judgment* in plaintiffs’ favor under similar factual circumstances after applying the *Mathews* test. *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214 (D. N.H. 2018) (granting plaintiffs’ request for summary judgment and permanent injunctive relief as to their procedural due process challenge against a New Hampshire mail-in ballot signature matching law); *Martin*, 341 F. Supp. 3d at 1338 (granting plaintiffs’ request for injunctive relief against a Georgia mail-in ballot signature matching law pursuant to procedural due process requirements); *Zessar*, 2006 WL 642646 at *7 (employing the *Mathews* test to strike down a mail-in ballot signature matching law on due process grounds). Based on the Complaint’s allegations, the private interest—here, the deprivation of the fundamental right to vote—weighs heavily in Plaintiffs’ favor. Moreover,

C. Plaintiffs' Equal Protection Claims

Plaintiffs' first equal protection claim generally asserts that the implementation of Texas' signature-matching provisions for mail-in ballots has placed an undue burden on certain voters' right to vote that is not justified by any state interest. *See* docket no. 1 ¶¶ 62-70. Plaintiffs' second equal protection claim generally targets the non-uniformity of the application of the law, and asserts that because neither uniform standards nor training is required with respect to signature comparison, the State's procedures are enforced in an "arbitrary" manner based on "ad hoc" standards. *See id.* at ¶¶ 71-74. Thus, Plaintiffs assert that the procedures for evaluating signatures "vary from county to county, from SVC to SVC in counties with multiple committees, and even from meeting to meeting and ballot to ballot." *Id.* at ¶ 73. In response, Defendant Secretary argues that (i) the State is permitted to treat mail-in voters differently than in-person voters, and (ii) the standard for comparing signatures is "sufficiently uniform to ensure equal treatment of voters." Docket no. 30 pp. 18-19.

For reasons similar to those set forth in the prior Section, the Court finds that Plaintiffs have adequately alleged a violation of the Equal Protection Clause in the Fourteenth Amendment.²¹

Plaintiffs' allegations indicate that the risk of erroneous deprivation of their rights is significant, as is the probable value of the procedural remedies that may be available. Finally, the allegations—especially those indicating that the State already affords similar safeguards to other groups of voters—indicate that the threat to government interests and the cost of remedial procedures are not significant.

²¹ The Court interprets the first equal protection claim (Count II) to largely overlap with Plaintiffs' due process claim, in which Plaintiffs contend that the Texas Election Code is unconstitutional to the extent it does not require that mail-in voters receive pre-rejection notice of a signature mismatch and an opportunity to cure an improper rejection. The Court interprets the second equal protection claim (Count III) to assert that the Texas Election Code places an undue burden on the right to vote to the extent it does not require the promulgation of uniform standards and/or training with respect to signature comparison such that signature comparisons are conducted in a consistent manner. Although Plaintiffs assert the claims separately, the Court will consider them together in this Section, in light of the fact that the Supreme Court has indicated that it is appropriate to consider the statutory framework as a whole in determining whether an undue burden has been

As an initial matter, the Court does not necessarily disagree with the Secretary's general assertion that a State may use different procedures for mail-in ballots as those used for in-person voting. *See ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (noting that voting by mail "is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures."). Here, however, the crux of Plaintiffs' equal protection claim is not a complaint that the Election Code contains different provisions for in-person and mail-in voting. Instead, Plaintiffs allege that the State's mail-in voting procedures (and their implementation by local officials) result in the disenfranchisement of eligible voters who attempt to vote by mail. This injury allegedly results both from the provisions' and local officials' failure to provide voters with pre-rejection notice and an opportunity to cure, as well as from the State's and local officials' failure to promulgate standards regarding signature comparison and/or training for EVBB and/or SVC members. Moreover, this type of alleged injury (*i.e.*, the improper rejection of a voters' ballots and the resulting disenfranchisement) places a significant burden on the voting rights of individuals who are eligible to and elect to vote by mail. *See* Section II.B., *supra*; *see also Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d at 1030 ("Disenfranchisement of approximately 5,000 voters based on signature mismatch is a substantial burden.").

The Court must compare this burden to Defendants' justification for the design and implementation of the mail-in ballot signature-matching procedures,²² and based on the allegations

placed on the right to vote. *See generally Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199 (2008). Moreover, Plaintiffs' first equal protection claim (in Count II) appears to also incorporate many of the allegations from the second (in Count III), including that the current mail-in ballot procedures involve "an error-prone signature comparison procedure conducted by election officials who are not trained in signature verification." Docket no. 1 p. 70.

²² As noted in Section II.B, *supra*, the parties appear to agree that the *Anderson/Burdick* standard governs the analysis of Plaintiffs' equal protection claims.

in the Complaint, Plaintiffs have adequately alleged that such a burden is not outweighed by any compelling justification. To the extent the Secretary asserts its interest in preventing voter fraud as a justification for the existing procedures, the prior Section explains how providing pre-rejection notice and an opportunity to cure may actually *further* that interest. *See* Section I.B & note 17, *supra*. In addition, to the extent that any party asserts that providing an opportunity to cure defects with a signature would result in unjustified costs or delays, the Complaint alleges that Defendants already provide such an opportunity to cure to in-person voters who fail to properly comply with in-person photo ID requirements. *See* docket no. 1 ¶ 59 (citing Tex. Elec. Code. § 65.0541). Moreover, at this stage, the Court is in no position to evaluate (i) the cost or burdens associated with promulgating standards and/or mandating training related to signature comparisons or (ii) the extent to which the existing provisions already result in uniformity,²³ and thus, neither evaluation is a basis for dismissal. Accordingly, at least based on Plaintiffs' allegations, the Court cannot conclude that any state interest outweighs the disenfranchisement that results from the existing mail-in ballot procedures and signature verification process.²⁴

Additionally, at least one court has applied the *Anderson/Burdick* framework to a similar equal protection claim targeting Florida's signature-comparison framework for mail-in ballots that failed to provide (i) pre-rejection notice and an opportunity to cure and/or (ii) uniform procedures for conducting signature comparisons, and that court issued injunctive relief after finding that the

²³ Defendant Secretary directs the Court to Tex. Elec. Code §§ 87.041(e), (f) & 87.027(i) for the proposition that "local election officials employ a uniform standard provided by statute" when comparing signatures. *See* docket no. 30 p. 19. However, these sections provide guidance as to which signatures an EVBB or SVC should use for the purposes of signature comparison, but the sections provide no guidance as to the appropriate procedure or standard for determining that a voter's signatures do not match.

²⁴ Of course, Defendants may certainly develop a record on these issues and move again on these issues if the record supports their contention.

plaintiffs were likely to succeed on the merits of their claim. *See Florida Democratic Party v. Detzner*, 2016 WL 6090943, at *1, *3 (“The issue in this case is whether Florida’s statutory scheme, which provides an opportunity to cure no-signature ballots yet denies that same opportunity for mismatched-signature ballots, is legally tenable. The answer is a resounding ‘no.’”). Although this Court fully recognizes that the Florida litigation challenged a different set of mail-in signature-comparison procedures, Plaintiffs’ burden at the motion to dismiss stage is much lower in this case. Thus, the court’s determination in the Florida litigation further enforces this Court’s conclusion that Plaintiffs have adequately *alleged* a potentially viable equal protection claim in this case. Accordingly, the Secretary’s Motion is denied to the extent it seeks dismissal of Plaintiffs’ equal protection claim.

Finally, much like with their due process claim, the Court concludes that Plaintiffs have also adequately asserted an equal protection claim against the Local Defendants. As an initial matter, the Court interprets the Complaint to assert its equal protection claims against both the Local Defendants and the Secretary.²⁵ As discussed above, the Court recognizes that the Local Defendants did not draft the Texas Election Code and their alleged conduct may have been

²⁵ The Brazos Motion correctly notes that Count III does not include a specific reference to “Defendants” or “Hancock,” and thus, the Brazos EA asserts that Count III does not state an equal protection claim against the Brazos EA. *See* docket no. 29 p. 6. As an initial matter, the Complaint contains general allegations regarding the non-uniformity of the signature-comparison process, including at the local level, and thus, the assertion of such allegations against the Local Defendants is hardly a surprise. *See* docket no. 1 ¶ 73. Moreover, as discussed in note 21, *supra*, the two equal protection claims overlap, and Plaintiffs’ allegations regarding the lack of uniformity and/or training regarding signature comparison are included both in Count II (which repeatedly identifies “Defendants” and describes their alleged conduct) and Count III (which describes local officials’ alleged conduct but does not specifically reference “Defendants”). Thus, for the practical purposes of this litigation, the Court concludes that Plaintiffs have adequately asserted a claim against the Local Defendants related to the uniformity of the signature-review process and/or the lack of training involving signature comparison, irrespective of whether the Brazos EA or McAllen City Secretary are specifically identified by name in Count III.

consistent with the explicit requirements of the Election Code. However, the allegations indicate that—through the enforcement of the Election Code’s provisions—the Local Defendants played an active role in the disenfranchisement of Plaintiffs and/or Plaintiffs’ members. Further, the allegations indicate that nothing in the Texas Election Code prohibits the Brazos EA and/or McAllen City Secretary from providing pre-rejection notice of a signature mismatch and/or an opportunity to cure, nor does any provision prohibit local election officials from providing training such that—at least locally—signature reviews are conducted in a uniform and non-arbitrary basis. Accordingly, the allegations in the Complaint do indicate that the Local Defendants were actors in Plaintiffs’ alleged equal protection violation, and thus, the Brazos Motion and McAllen Motion are also denied to the extent they seek dismissal of Plaintiffs’ equal protection claims pursuant to Rule 12(b)(6).

D. Plaintiff CTD’s ADA & RA Claims

A plaintiff asserting a claim under Title II of the ADA must allege: “(1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability.” *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011). The elements of a reasonable accommodation claim under Title II of the ADA and the RA are practically the same. *See* 29 U.S.C. § 794 (a) (“No otherwise qualified individual with a disability . . . shall, solely by reason of [] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity”); *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000) (noting that “Congress’ intent was that Title II extend the protections of the Rehabilitation Act”).

Plaintiff CTD alleges that “[d]efendants’ refusal to reasonably accommodate [] mail-in ballot voters with disabilities—either by allowing them to contest and cure a ballot rejected for signature mismatch or by not applying the signature-comparison requirements to their ballots—discriminates against said voters and excludes them from participation in and unfairly denies them the benefits of the mail-in ballot process.” Docket no. 1 ¶ 6. Defendant Secretary argues that Plaintiff CTD fails to state a claim under the ADA or RA and CTD fails to allege discrimination because the Texas Election Code provides for reasonable accommodations that prevent disabled individuals from being denied benefits. *See* docket no. 30 p. 20. Specifically, the Secretary states that “any disabled voter can avoid having the signature-comparison requirements applied to their ballots [if he or she] sign[s] through a witness.” *See id.* (citing Tex. Elec. Code § 97.041(b)(1)-(2)). The Secretary also asserts that disabled voters have the right to vote in-person at the curbside of a polling place if the voter is unable to enter the polling place. *See* docket no. 35 (citing Tex. Elec. Code § 64.009).

As an initial matter, the Court notes that Defendant Secretary has asked the Court to conclude—at the motion to dismiss stage—that the State has provided disabled plaintiffs with reasonable accommodations as a matter of law. The Secretary’s request again ignores that the Court must accept Plaintiffs’ allegations at this stage. The Secretary is welcome to make this argument at later stages in the litigation after an evidentiary record has been developed, but it would be improper for the Court to rely on these assertions as a basis for dismissal. Instead, upon a review of the allegations, the Court concludes that Plaintiff CTD has adequately alleged that disabled voters who are unable to duplicate their signatures are not provided an opportunity to vote that is equal and equally effective as the opportunity provided to others.²⁶ Accordingly, the

²⁶ Plaintiff CTD argues that the witness signature option deprives a disabled voter of the ability to vote privately. *See* docket no. 32 p. 40. The Secretary responds to CTD’s assertion by noting that

Secretary's Motion is denied to the extent it seeks dismissal of the Plaintiff CTD's ADA and RA claims.

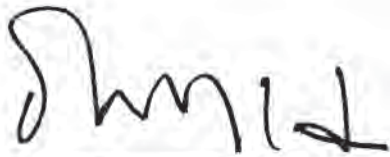
Finally, the Brazos Motion argues that the Complaint does not "state that [Hancock] did anything wrong" with respect to Plaintiff CTD's alleged ADA and RA violations. *See* docket no. 29 p. 6. Although the Brazos Motion contends that Hancock merely complied with state law, CTD alleges that Hancock's (and other local officials') enforcement of the Election Code violated the ADA and RA. *See, e.g.,* docket no. 1 ¶ 81. Accordingly, the Court finds that Plaintiff CTD has also adequately alleged a claim against Brazos EA with respect to violations of the ADA and RA, notwithstanding the Brazos Motion's contention that Hancock merely followed state law.²⁷

CONCLUSION AND ORDER

For the reasons set forth above, Defendants' motions to dismiss (docket nos. 27, 29 & 30) are **DENIED**.

IT IS SO ORDERED.

SIGNED this 23 day of December, 2019.


 ORLANDO L. GARCIA
 Chief United States District Judge

a disabled voter may still vote in private before having a witness sign the envelope. *See* docket no. 35 p. 10. Even assuming the Secretary's assertion is true, however, the framework still requires a disabled voter to locate and then seek the assistance of a witness, a burden that is not imposed on non-disabled voters. The same is also true to the extent a disabled voter must seek assistance in reaching the polling place before he or she is even able to vote curbside. Thus, the Court concludes that Plaintiff CTD states a claim pursuant to the ADA and RA even if the Secretary's assertions regarding accommodations are given weight at this stage.

²⁷ The McAllen Motion does not specifically address Plaintiff CTD's ADA and RA claim, but for the same reason, the Court concludes that Plaintiff CTD has also adequately alleged such a claim against the McAllen City Secretary.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE,
ELLEN SWEETS, BENNY ALEXANDER,
GEORGE MORGAN, VOTO LATINO,
TEXAS STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
and TEXAS ALLIANCE FOR RETIRED
AMERICANS,

Plaintiffs,

vs.

RUTH HUGHS, in her official capacity as
Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

DECLARATION OF LINDA JANN LEWIS IN SUPPORT OF PLAINTIFFS' MOTION

Pursuant to 20 U.S.C. § 1746, I, Linda Jann Lewis, declare as follows:

1. My name is Linda Jann Lewis. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.
2. I live in Waco, Texas, and am a registered voter in McLennan County. I am 73 years old and a member of the Texas Conference of the National Association for the Advancement of Colored People ("NAACP").
3. I have worked as the McLennan County elections administrator, a substitute teacher, a public information officer for emergency relief efforts in the state, a legislative consultant for the Texas Faculty Association, the Human Director in Travis County, the City of Waco's Equal Employment Opportunity Officer, and in the administrations of governors Bill Clemmons and Mark White. I have been on the Board of the McLennan County Branch of Texas

Democratic Women and the Board of the Austin Community Radio Inc., which is one of six independent African American controlled radio companies in the country. I also helped found the Austin Black Arts Alliance and am a member of the Afro American Players Inc., a theater company that produces plays about race relations in the United States. Currently, I volunteer with the NAACP as the Political Action Chair and work with the national organization's legal defense on voter protection. I also currently volunteer with the Waco Democratic Party and the Texas Democratic Party, consulting on voting issues.

4. Participating in elections is extremely important to me. I have voted in every single election, including all federal, state, and local elections, since 1965. Lyndon Johnson passed the Voting Rights Act while I was at freshman orientation at the University of Texas, and I immediately registered to vote on campus and joined the University of Texas chapter of the NAACP and the UT Democrats.

5. Although I have been able to vote by mail since turning 65 years old, I have not elected to do so because I do not have confidence that my ballot will be counted in McLennan County. However, because of my age and related health concerns, I have applied to vote by mail in November for the first time because I am concerned about the risk of contracting COVID-19, to which I am more susceptible to severe complications. Additionally, unless something drastically changes regarding the pandemic, I will also not be able to volunteer on Election Day or for early voting because it will not be safe to be around so many people who are standing in line and waiting to vote.

6. I suffer from a disability called kerataconus that affects my vision. To improve the impairments caused by kerataconus, I have had two cornea surgeries, four cataract surgeries, and most recently, a tissue transplant in my right eye. Despite these procedures, I still suffer from

impaired vision, which affects my ability to consistently sign my name. Due to my declining vision, my signature has changed over time. I am concerned that my mail-in ballot will be rejected because of signature mismatch, despite the fact that I personally signed my application to vote by mail and will personally sign the ballot carrier envelope. I have considered asking a friend to look over my mail-in ballot to ensure that the markings, including my signature, are legible, which makes me uncomfortable in that it violates the privacy and independence of my vote.

7. Because McLennan County does not prepay postage for mail ballots, I am also concerned about obtaining the necessary postage to mail my ballot in. I have to independently secure and pay for postage to mail my ballot. While I generally support the postal service, I do not think that I should have to spend money to cast my vote. Because of my age and preexisting conditions, I also try to avoid making unnecessary trips outside my home and do not want to have to leave my home to go buy stamps. I have not owned or driven an automobile in five years because of my vision impairment, which would make it much more difficult to obtain stamps even if I was willing to go out. And I do not keep a supply of stamps in my home because I live on less than a thousand dollars a month from Social Security and I have six monthly incurring bills that require almost every dollar of that, so I do not have the disposable income to use on stamps. Notably, I was delayed in applying to vote by mail because I didn't have adequate postage and had to wait for a friend to have the opportunity to bring stamps to me.

8. I am very concerned that with so many more people relying on the mail system, and not just for mailing ballots; my mail service will also be delayed. I am also worried that with Texas's large senior citizen population there will be many people, who, like me, have to vote by mail, and the addition of so many people voting by mail may mean that I do not receive my ballot

in time to send it off with plenty of time for it to be received and for me to confirm that it was counted.

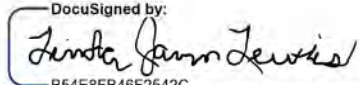
9. One of the main reasons why I have never voted by mail is because I am not confident that my ballot will be counted in McLennan County. I have been an advocate for fair voting in the county, and part of that has been criticizing the unfair practices of how elections are administered in the county. I suspect that my mail-in ballot will be subject to additional scrutiny in an effort to reject it so that my vote is not counted because I am not liked by the county administration.

10. I believe that *nothing* is more important than exercising the right to vote. I do not want to have to make a choice between my health, which is also important, and the franchise. I would feel more confident that every ballot will be counted if people have more than one option for returning their mail-in ballot, including having trusted individuals collect those ballots and deliver them directly to the election's office.

11. The Challenged Provisions frustrate my hard work in educating voters on voting by mail so that their voices are heard.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 17, 2020

By: 
Linda Jann Lewis

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE,
ELLEN SWEETS, BENNY ALEXANDER,
GEORGE MORGAN, VOTO LATINO,
TEXAS STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
and TEXAS ALLIANCE FOR RETIRED
AMERICANS,

Plaintiffs,

vs.

RUTH HUGHS, in her official capacity as
Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

**DECLARATION OF ELLEN SWEETS IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Pursuant to 20 U.S.C. § 1746, I, Ellen Sweets, declare as follows:

1. My name is Ellen Sweets. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.

2. I live in Austin, Texas, and am a registered voter in Travis County. I am 79 years old. I worked as a newspaper reporter for the St. Louis American, St. Louis Post-Dispatch, Dallas Morning News, and Denver Post. I also was the Executive Director of the St. Louis Civil Rights Enforcement Agency for three years. In 2008, after I retired, I moved to Austin to write a book about Molly Ivins, a political columnist and activist. I've also volunteered for various non-profit organizations with a focus on social justice and women's rights since moving to Austin.

3. I have always made it a priority to exercise my right to vote. I have participated in every election since I turned 18, including every election in Texas in the past 12 years. In the past,

I have voted in person because I feel more confident that I will successfully cast my ballot and have it counted. I have voted by mail only once, many years ago when I lived abroad. I like the experience of voting in person and feeling a part of the democratic process amidst my fellow citizens.

4. Despite this preference, I have made the decision to vote by mail in the November general election because of the current public health crisis. I understand that I am eligible to vote by mail because I am over 65 years of age. I suffer from severe asthma, and my doctors have instructed me that this puts me at a much higher risk of grave complications from COVID-19 which is, of course, a respiratory illness itself. For this reason, my doctors have instructed me to shelter in place until the risk of contracting the virus diminishes. I have rarely left my apartment since early February, even having my essentials and groceries delivered to avoid exposing myself to the disease. With the growing numbers of COVID-19 cases in Texas and the likelihood of a resurgence in the fall, I doubt I will be able to safely leave my apartment anytime soon, perhaps not even before the end of the year.

5. Despite the fact that I will choose to vote by mail in November, I do not have great confidence that my mail-in ballot will be counted. I understand there to be several restrictions in Texas's election law that make it challenging for individuals to successfully vote by mail. Those restrictions—the Postage Tax, Ballot Receipt Deadline, Signature Match Requirement, and Voter Assistance Ban (together, “Challenged Provisions”)—are the subject of this lawsuit. I believe that the Ballot Receipt Deadline, Signature Match Requirement, and Voter Assistance Ban will make it difficult for me to have my vote counted. Unfortunately, I have no other choice but to cast a mail-in ballot, as going to the polls and exposing myself to COVID-19 could literally be a matter of life and death.

6. I lack confidence in voting by mail in part because of the Ballot Receipt Deadline. Namely, I am concerned with the fact that USPS is overburdened and under-staffed, which has caused and will continue to cause delays in deliveries. I fear that I will not receive my mail-in ballot at all, or will receive it very close to the election, leaving me little time to mail it back with adequate time for it to arrive at the county before the deadline. I am also confused by the deadline: I understand that mail-in ballots must be postmarked by 7 p.m. on election day and received by the county by 5 p.m. the date after the election. This confuses me because it seems permissible to send the mail-in ballot back on election day, but there is no way that the ballot will arrive to the county the next day. I've noticed that mail typically takes at least a few days to reach its destination after being sent.

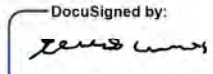
7. Furthermore, I am concerned about the Signature Match Requirement. On days when my asthma is very bad and I struggle to breathe I become easily fatigued, which I've noticed affects my handwriting. I am concerned that fluctuations in my handwriting because of fluctuations in my health will lead to my mail-in ballot being rejected because of signature mismatch, despite the fact that I personally signed my application to vote by mail and will personally sign the ballot carrier envelope in November. I believe it is very common for older people and people with disabilities to have changing handwriting and signatures. It occurs to me that the Signature Match Requirement may lead to older voters and disabled voters having their mail-in ballots rejected at a much higher rate than other mail-in voters. However, it is important for these populations to be heard to ensure that their interests are represented by elected officials. The enforcement of the Signature Match Requirement in November will affect my confidence in the election, and also my confidence that my interests will be represented by whoever wins each race in the election.

8. I believe that besides a person's health, there are few things more important than exercising the right to vote. I do not want to have to make a choice between my health and casting as ballot. I would feel more confident that my mail-in ballot and everyone else's mail-in ballot would be counted if people have more than one option for returning their mail-in ballot, including having trusted individuals collect those ballots and deliver them directly to the county election office. If the Voter Assistance Ban was overturned, I would ask a trusted friend to pick up my marked ballot and deliver it to the county. I would do that myself, but I have been instructed to shelter in place and I also have hip impairments that affect my mobility. Knowing that my ballot arrived before the Ballot Receipt Deadline would make me feel more confident that my vote will be counted.

9. While I have no other choice but to vote by mail in November's general election, the Challenged Provisions leave me with little confidence that my mail-in ballot will be counted. I fear that I will be disenfranchised in this very important election because I am unable to cast my ballot in-person. If Texas gives me the right to vote by mail, it should respect that right and not enforce laws that make voting by mail challenging at best and impossible at worst.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 15, 2020

By:  2DA672D667D34B3...
Ellen Sweets

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE,
ELLEN SWEETS, BENNY ALEXANDER,
GEORGE MORGAN, VOTO LATINO,
TEXAS STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
and TEXAS ALLIANCE FOR RETIRED
AMERICANS,

Plaintiffs,

vs.

RUTH HUGHS, in her official capacity as
Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

**DECLARATION OF BENNY ALEXANDER IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

Pursuant to 20 U.S.C. § 1746, I, Benny Alexander, declare as follows:

1. My name is Benny Alexander. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.

2. I live in San Antonio, Texas, and am a registered voter in Bexar County. I am 66 years old and the pastor of New Way Bible Fellowship Church in San Antonio. I have been at New Way Bible Fellowship for twelve years. I have been a minister for 22 years, and before becoming the pastor of New Way Bible Fellowship I was also a real estate appraiser.

3. I have always been politically and civically engaged. In 1988, I ran for state representative. Ex. A (Campaign Flyer). I was also on the Texas State Democratic Executive Committee for almost ten years, from 1997 to 2006. I represented 26 counties on the committee. Over the years, I've served on the Bexar County Housing Board, San Antonio Transit Board, San

Antonio Equal Employment Opportunity Committee, Bexar County Blue Ribbon Committee for the Sheriff's Department, and many more. I've also ran numerous local, state, and federal political campaigns.

4. Beyond these activities, I am committed to participating in elections so that my interests and the interests of the community I lead are heard. I have voted in every election since I turned 18. I have never voted by mail because as a community leader I prefer to go to the polls to engage others and show them that I am voting to lead by example. However, I suffer from congestive heart failure and diabetes, both of which put me at risk of severe complications from COVID-19. Therefore, though I prefer to vote in person, I plan to vote by mail in November 2020 because I am unwilling to expose myself to the risk of infection by waiting in long lines at Bexar County polling locations.

5. I am aware that Texas election law includes the Signature Match Requirement, which requires counties to verify a voter's signature with no instructions for county officials, and no provision of the opportunity for a voter to cure signature mismatch. I understand that this has resulted in mail-in ballots being rejected for signature mismatch reasons even though the ballot was, in fact, properly signed by the voter. I fear the same thing happening to me. As I get older and on days when my congestive heart failure has me feeling weak and lightheaded, I've noticed my handwriting and signature changes. And I understand that the signatures of even perfectly healthy people can fluctuate for no obvious reason. I fear that my mail-in ballot will be rejected for mismatching signatures despite my best effort to clearly and uniformly sign my application to vote by mail and my ballot carrier envelope.

6. I am also very concerned that I will be unable to return my marked mail-in ballot by the Ballot Receipt Deadline. I understand that the USPS is under great strain as many more

people are relying on the mail system in the pandemic. Coupled with the fact that many more people will be voting by mail this November because of the COVID-19 pandemic, there is the distinct possibility that I will not receive my mail-in ballot in time to mark it and mail it back before the Ballot Receipt Deadline.

7. I believe that besides a person's health, there are few things more important than exercising the right to vote. I do not want to have to make a choice between my health and casting as ballot. I would feel more confident that every ballot will be counted if people have more than one option for returning their mail-in ballot, including having trusted individuals collect those ballots and deliver them directly to the county election's office. Because I fear that my mail-in ballot could arrive back to the county late because of postal delays out of my control, I would feel more comfortable if I could guarantee its timely arrival by having a friend or family member drop it off at the county. However, I know that the Voter Assistance Ban makes such help a felony and I am unwilling to expose anyone to criminal liability for assisting me, even if that means my mail-in ballot arrives late and goes uncounted.

8. Because of the Signature Verification Requirement, Ballot Receipt Deadline, and Voter Assistance Ban, I think there is a significant risk that my mail-in ballot will not be counted in November's general election. I hope that the court prevents the enforcement of these laws in November so that I can vote in confidence without exposing myself to grave health risks.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 6/15/20

By: Benny Alexander
Benny Alexander

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE,
ELLEN SWEETS, BENNY ALEXANDER,
GEORGE MORGAN, VOTO LATINO,
TEXAS STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
and TEXAS ALLIANCE FOR RETIRED
AMERICANS,

Plaintiffs,

vs.

RUTH HUGHS, in her official capacity as
Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

DECLARATION OF GEORGE MORGAN IN SUPPORT OF PLAINTIFFS' MOTION

Pursuant to 20 U.S.C. § 1746, I, George Morgan, declare as follows:

1. My name is George “Eddie” Morgan. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.

2. I live in Dallas, Texas, and am a registered voter in Dallas County. I am 63 years old and a member of the Texas Alliance for Retired Americans (“TARA”). I worked as a geriatric nurse until 1989, when I was instructed by my doctor to terminate my employment for disability reasons, as my contact with patients was threatening my health.

3. I have been politically engaged since elementary school, when my classmate’s father was a candidate for city council and ran his campaign out of my parent’s home. I’ve also been involved in the Stonewall Democrats in Dallas, an LGBTQ Democratic organization, and was member of the year in 2014. For the past several years, I have participated in TARA activities

as a member. Those activities include attending protests, encouraging voter engagement, and registering voters. I am also a precinct chair and voter registrar in Dallas County.

4. Participating in elections is extremely important to me. I have voted in all but one election—local, state, and federal—since I turned 18. I was unable to vote in one election because I was hospitalized unexpectedly and I did not have time or opportunity once hospitalized to get a mail-in ballot.

5. I suffer from a condition called Mounier-Kuhn syndrome, a genetic lung disorder resulting in frequent respiratory tract infections and low lung function. I have had this condition since birth, and have been hospitalized, on average, every other year because of bronchiectasis. My condition requires me to do antibiotic breathing treatments three times a day, use inhalers throughout the day, and receive an IV to give me antibodies for pneumonia every month. I typically receive those IV treatments in the hospital, but because of the COVID-19 pandemic, I am now receiving those treatments at home. During the fall, I suffer from sinusitis that exacerbates the symptoms of my condition.

6. Although I now know that I have been able to vote by mail because of my condition, I have never done so in the past because I did not know I was able to, and because I enjoy voting in person. However, because of my health concerns, I have applied to vote by mail for the July run-off election and the November general election for the first time because I am concerned about the risk of contracting COVID-19, to which I am more susceptible to severe complications. Additionally, unless something drastically changes regarding the pandemic, I will also not be able to volunteer on election day or for early voting because it will not be safe to be around so many people who are standing in line and waiting to vote.

7. Because I suffer from Mounier-Kuhn syndrome, my handwriting abilities fluctuate every day depending on my lung function that day. This is because when I am short of breath, I become shaky and fatigued, which makes my handwriting less legible. I am concerned that my mail-in ballot will be rejected because of signature mismatch under the Signature Match Requirement, despite the fact that I personally signed my application to vote by mail, personally signed the ballot carrier envelope for the July run-off, and will personally sign the ballot carrier envelope in November. If it is rejected, I will have no opportunity to fix the problem and make sure my vote is counted; I would simply be disenfranchised. It is unacceptable to me that mail-in ballots can simply be thrown out without the opportunity to cure, particularly when people like me can only vote by mail because of the public health crisis and so can't avoid the risk of disenfranchisement by voting in person.

8. I am very concerned that with so many more people now relying on the mail system, and not just for mailing ballots, my mail service will be delayed. I am also worried that with Texas's large senior citizen population there will be many people who, like me, have to vote by mail and the county and USPS will not be able to accommodate the influx. This could result in voters receiving their mail-in ballots very close to the election, with insufficient time to mail those ballots back and guarantee that they arrived to the county by the Ballot Receipt Deadline. In my situation specifically, the USPS worker that serves my senior apartment community was not allowed on the premises in March, April, or May, meaning that delivery of my mail was disrupted. While he has been allowed back in because the state has been reopening, I am concerned that there will be disruptions again in the fall when there is likely to be a resurgence of the COVID-19 pandemic.

9. I believe that besides a person's health, there is nothing more important than exercising the right to vote. I do not want to have to make a choice between my health and casting as ballot. I would feel more confident that every ballot will be counted if people have more than one option for returning their mail-in ballot, including having trusted individuals collect those ballots and deliver them directly to the county election's office.

10. Before I received my mail-in ballot for the July run-off, I believed that I would have to pay postage to return that ballot. However, when I received the ballot, I was pleasantly surprised to learn that Dallas County, unlike all other Texas counties that I'm aware of, provides postage prepaid. I am still concerned about others like me—including other TARA members—residing outside of Dallas County, who will have to obtain the necessary postage to mail their ballots in. They will have to independently secure and pay for postage to mail their ballot, but I do not think people should have to spend money to cast their vote.

11. Because of my condition, I have been unable to work for the past 31 years and have lived solely on disability insurance payments and food stamps. Those payments barely cover my necessary expenses to survive. I know for a fact there are many people in the same position in Texas, who are not lucky enough to live in a county that prepays postage, and who will struggle to obtain the necessary postage to return their mail-in ballots because they cannot afford that postage and because they cannot risk their health by leaving their homes to purchase that postage. I also know there are people in West Texas, for example, who are 40 miles from the nearest post office.

12. The laws we are challenging in this case frustrate my hard work in educating voters on voting by mail so that their voices are heard. They also directly threaten my ability to have my vote counted.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 6-16-2020

By: George Morgan
George Morgan

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE,
ELLEN SWEETS, BENNY ALEXANDER,
GEORGE MORGAN, VOTO LATINO,
TEXAS STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
and TEXAS ALLIANCE FOR RETIRED
AMERICANS,

Plaintiffs,

vs.

RUTH HUGHS, in her official capacity as
Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

**DECLARATION OF MARÍA TERESA KUMAR IN SUPPORT OF PLAINTIFFS’
MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to 20 U.S.C. § 1746, I, María Teresa Kumar, declare as follows:

1. My name is María Teresa Kumar. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.

2. I am the President and Executive Director of Voto Latino, a 501(c)(4) nonprofit, social welfare organization that engages, educates, and empowers Latinx communities across the United States. Voto Latino’s mission is to ensure that Latinx people, including nearly 5.6 million eligible Latinx voters in Texas, are enfranchised and included in the democratic process and to increase civic participation among Latinx communities. To accomplish its mission, Voto Latino works in key states which have significant Latinx populations, such as Texas, California, Arizona, Nevada, Colorado, Florida, New Mexico, and Georgia.

3. Since its inception, one of Voto Latino's main priorities has been to register eligible Latinx voters to vote. To date, Voto Latino has registered close to 700,00 voters across the country. In 2018 specifically, Voto Latino registered 58,000 Texas voters, and was responsible for 15% of all new registered voters in the state. Among the Texas voters registered by Voto Latino in 2018, 77% of them turned out to vote. In 2020, Voto Latino has already registered over 97,000 new Texas voters and expects to register many more before the November general election. It also expects voter turnout in equal or greater numbers compared to the 2018 general election.

4. In the 2018 election cycle, Voto Latino was heavily involved in get-out-the-vote ("GOTV") efforts across its key states, including in Texas. These nationwide efforts included targeting 500,000 voters to encourage them to vote, arranging and funding almost 13,000 rides to the polls in critical states, and holding 70 grassroots events in key markets across the country.

5. In 2018, in Texas specifically, Voto Latino concentrated on engaging and mobilizing Latinx millennial and Gen Z voters through a digital engagement strategy, in addition to its regular voter registration efforts in Texas. Voto Latino worked with partners on the ground in Texas to coordinate voter engagement events. In the 2020 election cycle, the COVID-19 pandemic has affected how Voto Latino can engage voters and get out the vote while still protecting the health of its members and volunteers. It has transferred its in-person efforts for registration and GOTV to virtual events.

6. Voto Latino has also shifted some of its focus on registering voters to educating Latinx voters on voting by mail. It is emphasizing voting by mail, in part, because many of its members live in multi-generational households that rely on mature adults working multiple jobs to support both aging parents and young children. The elderly, those in frequent contact with the elderly, and those who cannot afford to become ill and incapable of supporting their family are

likely not to turn out to vote in person in the November general election due to concerns with being exposed to COVID-19. Moreover, business interruption, particularly in Texas's tourism-heavy economy, has caused Voto Latino's members to lose work or face job loss, increasing their financial stress and requiring them to spend extra effort and resources looking for work or trying to avoid job loss. Many of these voters cannot afford to take time off of work, or looking for work, to vote in-person within a relatively small window of time.

7. Despite the importance of voting by mail for Latinx voters during the pendency of the COVID-19 pandemic, there are significant risks that many mail-in ballots will go uncounted. These risks include voters not timely receiving their mail-in ballots, marked mail-in ballots not being mailed or not being delivered to county election administrators for want of sufficient postage, mail-in ballots not being postmarked by 7 p.m. on election day and delivered to county election administrators by 5 p.m. the day after the election, and mail-in ballots being rejected for signature mismatch reasons. The likelihood of such risks leading to disenfranchisement is heightened for Voto Latino's members because of multiple factors, including language barriers; failure to receive vote-by-mail ballots due to housing instability and displacement related to economic hardship or job loss; the cost or time to acquire proper postage; and ballots not being delivered by the deadline for any number of reasons, such as voter inexperience with how long it takes for mail to be delivered. We understand, for instance, that voting data in several states shows that, relative to white voters, the mail-in ballots of Latinx voters are invalidated at a disproportionate rate for failure to arrive by the deadline.

8. To minimize these risks, Voto Latino is mounting a multi-million-dollar effort to educate Latinx voters on voting by mail. That current effort largely involves phone banking, in which volunteers call other Texans to let them know how to apply to vote by mail *and* how to

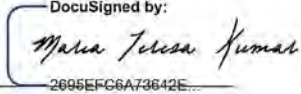
increase the likelihood that their mail-in ballots are counted. The latter discussion includes educating voters on the Postage Tax, Ballot Receipt Deadline, Signature Match Requirement, and Voter Assistance Ban (together, “Challenged Provisions”). Because Voto Latino understands that there will be an unprecedented influx of voting by mail this November due to the COVID-19 pandemic, it has determined that educating voters on these hurdles is imperative. Indeed, all of the work that Voto Latino does to register voters and inform them on how to register and apply to vote by mail means little if Latinx voters’ mail-in ballots are not counted because of the Challenged Provision’s arbitrary restrictions.

9. Should the Challenged Provisions remain in effect, Voto Latino intends to expend additional resources and staff time to educate Texas’s Latinx voters on when and how to cast their mail-in ballots. Specifically, Voto Latino has had to dedicate staff time towards launching a digital educational campaign aimed at educating Latinx voters on the Challenged Provisions and will have to expend corresponding financial resources to advertise and promote that campaign.

10. Were the Challenged Provisions invalidated, Voto Latino would reallocate resources that will now go to educating Latinx voters in Texas on those provisions to other activities, such as registering new voters, engaging in GOTV activities to turnout Latinx voters in Texas or other states, and ensuring that it can reach more Latinx voters to educate them on how to *apply* to vote by mail. Voto Latino would also organize an effort to collect marked mail-in ballots and deliver them to county election administrators to ensure the receipt of those votes in light of the current strain on the USPS. Voto Latino has limited resources to do its work, and any resources spent on general voter education necessarily takes away from our other key activities.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 15, 2020

By:  2695EFC6A73642E...

María Teresa Kumar
President and Executive Director
Voto Latino

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE,
ELLEN SWEETS, BENNY ALEXANDER,
GEORGE MORGAN, VOTO LATINO,
TEXAS STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
and TEXAS ALLIANCE FOR RETIRED
AMERICANS,

Plaintiffs,

vs.

RUTH HUGHS, in her official capacity as
Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

DECLARATION OF JUDY BRYANT IN SUPPORT OF PLAINTIFFS' MOTION

Pursuant to 20 U.S.C. § 1746, I, Judy Bryant, declare as follows:

1. My name is Judy Bryant. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.
2. I am currently the Field Organizer for Texas Alliance for Retired Americans ("TARA"). TARA is incorporated in Texas as a 501(c)(4) nonprofit, social welfare organization. It is a chartered state affiliate of the Alliance for Retired Americans.
3. TARA has more than 145,000 members, comprised of retirees from public and private sector unions, community organizations, and individual activists from every county in Texas. Most of our members are between 65 and 85 years of age. TARA also has many members with disabilities.

4. TARA's mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. It accomplishes this mission by actively pursuing and promoting legislation and public policies that are in the best interest of current and future retired Texans. TARA also accomplishes its mission by ensuring that its members actively participate in and vote in Texas's elections. Because a significant percentage of Texas's elections are decided by close margins, it is essential that TARA's members are able to effectively exercise their right to vote. To ensure that our members can make their voices heard in Texas elections, TARA traditionally engages in get-out-the-vote (GOTV) efforts. These GOTV efforts traditionally consist of making phone calls to members and knocking on doors to encourage members to vote. When we call our members in advance of an election, we encourage them to vote, and try to assist our members in navigating the voting process if they need help.

5. The outbreak of the COVID-19 pandemic has affected how TARA allocates its resources to encourage voting. Because nearly all of TARA's members are of an age that place them at a heightened risk of complications from coronavirus, our members are overwhelmingly likely to vote by mail this year instead of voting in person. I understand from talking to TARA members and other political organizers in the state that many more people are voting by mail this year when compared to other years. Thus, TARA has redirected much of its time and resources to efforts in educating voters on how to apply to vote by mail and how to successfully cast a mail-in ballot. These efforts include the creation of a special vote-by-mail committee that meets weekly to coordinate statewide outreach, phone-banking to make direct contact with Texas voters over the age of 65, and lobbying state officials to ease the restrictions on voting by mail. TARA also holds socially distanced events, such as the upcoming car caravan to publicize the need to vote by mail in the 2020 general election.

6. TARA educates voters not just on how to apply to vote by mail, but also about how to increase the likelihood of having their mail-in ballots counted. This is because Texas's Postage Tax, Ballot Receipt Deadline, Signature Match Requirement, and Voter Assistance Ban (together, "Challenged Provisions") all make it more difficult for TARA's members and other vulnerable people to vote and to have their votes counted. TARA members are, for example, voters who are likely to face difficulty acquiring postage or delivering a mail ballot themselves should they be unable to return it through the mail in sufficient time for their ballot to be counted. For the countless TARA members who are immunocompromised or have a disability that prevents them from easily leaving the home, venturing out to acquire postage to mail their ballot or to deliver their ballot in person is at best, dangerous, and at worst, simply impossible. Relatedly, the many TARA members who will need to cast their ballot by mail in upcoming elections to avoid severe illness are at substantial risk of not having their mail-in ballots counted if they do not arrive by the Ballot Receipt Deadline. While thousands of TARA's members are burdened by the Challenged Provisions, the organization has specifically identified one member, a named plaintiff in this case, who will be burdened by the Challenged Provisions in upcoming elections: George "Eddie" Morgan.

7. The Challenged Provisions frustrate TARA's mission because they deprive individual members of the right to vote and to have their votes counted, threaten the electoral prospects of TARA-endorsed candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and make it more difficult for TARA and its members to associate to effectively further their shared political purposes.

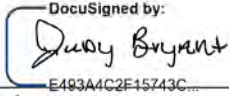
8. The Challenge Provisions also diminish the electoral prospects of TARA's endorsed candidates. TARA has already endorsed several candidates for state office and will

endorse additional state and federal candidates after the July runoff election. These candidates will be less likely to win if the mail-in votes of their supporters go uncounted because of the Challenged Provisions.

9. Because of the increased burdens on mail-in voting created by the Challenged Provisions, TARA will be required to divert time and resources to educating members about these requirements and assisting them in complying so that their mail-in ballots are received, accepted, and counted. However, TARA does not have limitless resources. Efforts to ensure members are not disenfranchised by the Challenged Provisions will reduce TARA's time and resources that would otherwise go to educating members on critical public policy issues, including the pricing of prescription drugs and the expansion of Medicare and Medicaid benefits, among many other of our priorities. Our efforts to ensure our members are not disenfranchised by the Challenged Provisions will also reduce the time and resources available to track and monitor legislation that threatens Texas's seniors, work that we view as critical to our organization. Finally, our efforts to educate voters about the Challenged Provisions has required us to divert resources from registering Texas voters.

10. In sum, the Challenged Provisions make it harder for TARA to realize its mission and for TARA's members to vote and have their votes counted.

DATED: June 17, 2020

By:  E493A4C2F15743C...
Judy Bryant
Field Organizer
Texas Alliance for Retired Americans

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

LINDA JANN LEWIS, MADISON LEE,
ELLEN SWEETS, BENNY ALEXANDER,
GEORGE MORGAN, VOTO LATINO,
TEXAS STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
and TEXAS ALLIANCE FOR RETIRED
AMERICANS,

Plaintiffs,

vs.

RUTH HUGHS, in her official capacity as
Texas Secretary of State,

Defendant.

Civil Action No. 5:20-cv-00577

Related to *Gloria et al. v. Hughs et al.*,
No. 5:20-cv-00527

DECLARATION OF GARY BLEDSOE IN SUPPORT OF PLAINTIFFS' MOTION

Pursuant to 20 U.S.C. § 1746, I, Gary Bledsoe, declare as follows:

1. My name is Gary Bledsoe. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.

2. I am the President of the Texas Conference of the National Association for the Advancement of Colored People ("TX-NAACP"), a 501(c)(4) nonprofit, social welfare organization whose mission is to secure the political, educational, social, and economic equality of black Americans. The TX-NAACP represents the interests of more than 10,000 members in Texas, as well as the over 2 million likely black registrants to vote in the 2020 general election.

3. Fundamental to its mission is the TX-NAACP's work to ensure that all people of color, and black voters specifically, are enfranchised and included in the democratic process. It therefore strives to increase civic participation among black voters by engaging in voter education

and registration activities such as Project VIER (“Voter Information, Education, and Registration”) in churches, neighborhoods, and on college campuses across the state to reach voters and help them to register and eventually vote. Project VIER was created in 2015 to celebrate the 100-year anniversary of the Voting Rights Act. In 2018, the TX-NAACP also conducted a voter protection campaign and engaged in legislative activity related to Texas’s voter identification law and other voting rights issues.

4. In the 2020 election cycle, the COVID-19 pandemic has affected TX-NAACP’s prioritization of different voting rights issues. Because black Americans are contracting COVID-19 and suffering its devastating effects at a disproportionately high rate, TX-NAACP is aware of the need to protect this group from unnecessary exposure. It has therefore invested time, energy, and resources in a vote-by-mail campaign. This campaign has included filing an amicus brief in the Texas Supreme Court raising the fact that it is necessary for those individuals with underlying health conditions to be able to vote by mail in November 2020 because of the public health crisis. TX-NAACP’s local branches are also holding remote Get Out The Vote events, such as phone banking to educate Texans on applying to vote by mail.

5. But *applying* to vote by mail is not the only challenge to black voters in Texas. There are also significant risks that many mail-in ballots will go uncounted. These risks include voters not timely receiving their mail-in ballots, marked mail-in ballots not being mailed or not being delivered to county election administrators for want of sufficient postage, mail-in ballots not being postmarked by 7 p.m. on election day and delivered to county election administrators by 5 p.m. the day after the election, and mail-in ballots being rejected for signature mismatch reasons. The likelihood of such risks leading to disenfranchisement is heightened for TX-NAACP’s members because of multiple factors, including the failure to receive vote-by-mail ballots due to

housing instability and displacement related to economic hardship or job loss, the cost or time to acquire proper postage, and ballots not being delivered by the deadline for any number of reasons, such as voter inexperience with how long it takes for mail to be delivered.

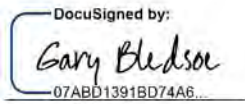
6. Because of these concerns, TX-NAACP's vote-by-mail campaign also educates Texans on the hurdles in having one's mail-in ballot counted in the hopes that our members will be able to navigate the arbitrary burdens in Texas election law. This discussion includes educating voters on the Postage Tax, Ballot Receipt Deadline, Signature Match Requirement, and Voter Assistance Ban (together, "Challenged Provisions") that are at issue in this case. Because TX-NAACP understands that there will be an unprecedented influx of voting by mail this November due to the COVID-19 pandemic, it has determined that educating voters on these hurdles is imperative. Indeed, all of the work that TX-NAACP does to register black voters and inform them on how to apply to vote by mail means little if their mail-in ballots are not counted because of the Challenged Provision's arbitrary restrictions.

7. Should the Challenged Provisions remain in effect, TX-NAACP intends to expend additional resources and staff time to educate Texas's black voters on when and how to cast their mail-in ballots. Specifically, TX-NAACP has had to dedicate an enormous amount of time toward educating black voters on the Challenged Provisions. Were the Challenged Provisions invalidated, TX-NAACP would reallocate resources—including the time of over 350,000 volunteers in Texas—that will now go to educating black voters on those provisions, to other activities, such as registering new voters, engaging in GOTV activities (it had aimed to target over 600,000 black voters in Texas for the 2020 general election), and ensuring that it can reach more black voters to educate them on how to apply to vote by mail. TX-NAACP has limited resources to do its work,

and any resources spent on voter education about the Challenged Provisions necessarily takes away from its other key activities.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 17, 2020

By:  07ABD1391BD74A6...
Gary Bledsoe
President
Texas Conference of the NAACP